

## Central Law Journal.

ST. LOUIS, MO., DECEMBER 3, 1897.

In view of its importance to the legal fraternity, we call attention to the announcement made by the United States Civil Service Commissioners, of an examination at Washington, D. C., and other cities, where there are applicants who can qualify, to be held on December 16th, 1897, for the purpose of establishing a register of eligibles for the position of assistant attorney in the office of the assistant attorney-general for the interior department. The salaries of these positions range from \$2,000 to \$2,750, but the department generally makes original appointment only to vacancies in the \$2,000 class, and fills those in the higher classes by promotion. The department asks for lawyers not over 55 years of age who have had (1) an actual practice of not less than five continuous years in the highest court of their State, and (2) an active practice of not less than five years (either during the same five years above required or otherwise) either before public land tribunals, or before the courts in a State where the application of public land laws constitutes a material part of the work, namely, Alabama, Arkansas, California, Colorado, Florida, Idaho, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Washington, Wisconsin, Wyoming, Arizona, New Mexico, Oklahoma, and Utah. Service on the bench will be counted as practice in these requirements. No application for this examination can be accepted unless the applicant is shown to be possessed of these preliminary qualifications. Those who possess them and who desire to compete in the examination should write to the U. S. Civil Service Commission, Washington, D. C., for the necessary blank forms of application and file their applications as early as possible, accompanied with satisfactory written evidence of the preliminary qualifications required. The examination will consist of (1) ten questions in general law, (2) thirty questions in public land laws, including homestead, desert, mining, pre-emption, timber culture, town-site, swamp land, school land, and railroad grant laws;

and (3) questions calculated to call forth the competitor's experience in the application and administration especially of public land laws. The relative weights of the subjects will be (1) general law, 20 per cent.; (2) public land law, 60 per cent., and (3) experience, 20 per cent. No sample questions can be furnished. Eight consecutive hours will be allowed in which to complete the examination.

Hereafter litigants, who endeavor to sue as "poor persons" in the United States Circuit Court at Chicago, will find a serious obstacle in a recent ruling by Judge Grosscup. In a late case, in that court, the defendant's counsel asked for a rule requiring plaintiff to give bond for costs. Plaintiff's counsel presented an application accompanied by affidavit alleging that plaintiff was a poor person and unable to pay or secure the costs. The defendant's counsel replied that plaintiff had assigned to his counsel a portion of the judgment to be recovered as a fee for services in prosecuting the case and that such action made plaintiff's counsel a party to the suit, and as he could give bond for costs he should be required to do it. On the other hand plaintiff's attorney contended that the law did not permit him to be a party in interest in such manner, but Judge Grosscup overruled the point and announced the rule as follows: "Hereafter the plaintiff filing such affidavit and his counsel of record will sign a stipulation to the effect that no agreement has been entered into between them guaranteeing the counsel a division of the judgment, and that no such assignment shall be made to the final disposition of the suit, either here or in the higher courts, if appealed. The stipulation shall further provide that when judgment is finally obtained, and the money is paid into court, it shall remain in the hands of the clerk and be disposed of under the order of the court. First, the costs shall be paid. Then the attorney shall receive for his service a fee determined in size by the judgment of the court. The rest shall go in cash to the plaintiff." Judge Grosscup held that in a sense such a plaintiff is a ward of the court, and should be protected if there be merit in the case. If there be no merit—which he holds is true in four out of five cases brought—it must be discouraged with all pos-

sible speed. This new rule will undoubtedly have a tendency to discourage and curtail purely speculative litigation, and the example of Judge Grosscup might well be followed by other courts.

## NOTES OF RECENT DECISIONS.

**CORPORATIONS — FOREIGN CORPORATIONS — SERVICE OF PROCESS.**—The Supreme Court of Iowa has decided in the case of *Farrel v. Oregon Gold Min. Co.*, 49 Pac. Rep. 876, that if a foreign corporation does business in a State, it renders itself subject to service of process upon its officers or agents in that State, and this, too, where there is no special provision to that effect in the laws of the State. The court said: "Now, by the laws and policy of this State, foreign corporations are as free to engage in business therein as corporations of its own creation; but, no special provision having been made for the service of process upon them \* \* \*, it may be made in like manner as upon domestic corporations, and a return thereof, good in an action against the latter, will, under similar circumstances, be good against the former." The view of the court seems opposed by the doctrine of *St. Clair v. Cox*, 106 U. S. 350, which case the court cited as in support of its view. That case holds that a State may declare, as a condition of a corporation's doing business within its borders, that the corporation shall be hable to service of process, and that that condition may be implied as well as expressed. For, "if a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission."

**CRIMINAL LAW—LARCENY BY DECEPTION.**—It is decided by the Supreme Court of Indiana in *Crum v. State*, 47 N. E. Rep. 833, that where defendants, through representations of their ability to procure counterfeit money, obtained the money of another for the pretended purpose of purchasing for him such counterfeit money, but really intending to deprive him of it by such deception, and at once to appropriate it to their own use

that they were guilty of larceny, and not of obtaining money under false pretenses, as the title to the money so obtained did not pass. The following is from the opinion of the court:

Counsel endeavor to argue that the crime committed was that of obtaining money under false pretenses, and not larceny. The facts, however, show that Haines parted with the possession only, and not with the title to his money. It was to be returned to him in thirty days at the furthest, or five to one should be given him for it in the New York money. They did neither. Larceny may be committed not only by taking property from another without his knowledge, but also by a trick, by means of which the owner's property is taken by some false token or other deception. If there is a present purpose to obtain possession of the property of another by such deception, and to at once appropriate the property to the use of the wrongdoer, there is larceny. Indeed, in such a case, there is in reality a taking without the knowledge of the owner; for, by means of the trick or deception practiced, his knowledge is clouded, so that he loses possession of his property without realizing that it has been taken. But in such a case the title remains with him, so that the crime is larceny, and not obtaining property under false pretenses. In the latter case, both the possession and the title go to the wrongdoer. The owner freely parts with both, either for some worthless consideration or because in some way he is persuaded to do so by false representations. Had appellants, in this case, carried out their agreement and procured the counterfeit money by investing Haines' money in New York, it might be that he would thus have parted with the title, and the offense would have been that of obtaining money under false pretenses. But, as it was, appellants had no intention to do as they agreed, but at once appropriated the money to their own use. This was larceny.

It has frequently been held that larceny may be committed by wrongfully obtaining possession of property by trick, as well as by securing it by stealth. See *Fleming v. State*, 136 Ind. 149, 36 N. E. Rep. 154; *March v. State*, 117 Ind. 547, 20 N. E. Rep. 444; *Grunson v. State*, 89 Ind. 533, and authorities cited in those cases. In *Gillett, Cr. Law*, 2d Ed., sec. 540, the rule in such cases is well stated as follows: "Where the defendant, with a preconceived design to steal the property, obtains possession of it by fraud, the taking is larceny, for the reason that, as the fraud vitiated the transaction and left the title in the original owner, he still retained a constructive possession of the goods, and the conversion of them by the defendant is such a trespass to that possession as makes larceny." Other authorities showing that larceny may be committed by trick or deception are *Huber v. State*, 57 Ind. 341; *Loomis v. People*, 67 N. Y. 322; *People v. Rae*, 66 Cal. 423, 6 Pac. Rep. 1; *People v. Shaw*, 57 Mich. 403, 24 N. W. Rep. 121; *U. S. v. Murphy*, 48 Am. Rep. 754; *Sultan v. Gerdau*, 119 N. Y. 380, 23 N. E. Rep. 864. It is true that where there is a contract for the loan of money, or where money is otherwise voluntarily paid to another, on account of some misrepresentation, the crime may be that of obtaining money under false pretenses, and not larceny. Such cases were *Perkins v. State*, 65 Ind. 317, and *Kellogg v. State*, 26 Ohio St. 15, cited by appellants. Those cases are not here in point. Here the money was obtained under an agreement to purchase certain

pretended other money, without any design on the part of the conspirators to make any such purchase, but with the intention of appropriating the money to their own use.

**AUCTION—REAL ESTATE—REPRESENTATIONS—DESCRIPTION OF INCUMBRANCE.**—The Court of Appeals of New York decide, in *Blanck v. Sadlier*, that when real estate is sold at auction, under terms of sale describing it as subject to a mortgage of a certain amount, at a certain rate of interest, and having a certain time to run, no other statement or representation as to the terms or character of the mortgage being made, the fact that such mortgage contains a clause requiring the amount secured to be paid in gold coin, of the present standard of weight and fineness, does not constitute such a variation from the incumbrance described as to justify a purchaser in rejecting the title. Two of the members of the court dissented. Andrews, C. J., for the majority of the court, says:

The sole question presented by this record is whether the plaintiff, by reason of the presence in the mortgage of this provision, was justified in refusing to accept the title, and became entitled to maintain this action. The general rule is well settled that a vendor, under an executory contract for the sale of land, unless exempted by the terms or nature of the contract, is bound to convey a good title, free from any essential defect; and the purchaser cannot be compelled to accept a conveyance of property differing from the contract in any material particular. The obligation of the vendor to convey a good title exists, independently of any express undertaking in the contract. Where not expressed, it is implied from the nature of the transaction. And, although the title tendered may in fact be good, yet if it is subject to reasonable doubt, depending upon the ascertainment of some material fact extrinsic to the record title, to be found by a jury when the question arises, the purchaser, in general, will not be required to complete the purchase, for he is entitled to a title not only good in fact, but marketable. *Burwell v. Jackson*, 9 N. Y. 535; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. Rep. 906; *Moore v. Williams*, 115 N. Y. 586, 22 N. E. Rep. 233; *Leake*, Cont. 831. Where the vendor refuses to perform his contract, or is unable to do so by reason of some defect in the title affecting the substance of the thing contracted for, or where the contract was induced by fraud or misrepresentation, the vendee may treat the contract as rescinded, and recover back any deposit made on account of the purchase money and the necessary expenses to which he has been put preliminarily to the completion of the contract on his part. *Lawrence v. Taylor*, 5 Hill, 114; *Graves v. White*, 87 N. Y. 463; *Leake*, Cont. 107, 1070.

The action brought by the vendee in the present case proceeds on the theory that, by the contract of sale, the mortgage subject to which he purchased was to be a mortgage payable in any lawful currency, and that the provision therein which required its payment in gold coin was not the incumbrance described in the conditions of sale, and that he was not bound to accept the conveyance tendered by the defendant, un-

less he procured the mortgage to be reformed in this respect. Whether this action is regarded as an action based on a rescission of the contract by the plaintiff for the default of the defendant in performing the contract, or as an action for damages for its breach, it is plain that in either aspect it is a fundamental condition to its maintenance that the plaintiff should establish that there was an undertaking by the defendant, based upon contract or upon a representation equivalent to a contract, that the mortgage subject to which the plaintiff purchased was payable generally, and could be discharged by payment in any legal currency. We think there was no such contract or representation. It is not claimed that there was any representation as to the terms of the mortgage, outside of the conditions of sale. The amount of the mortgage was stated, the rate of interest, and the time it was to run. It made no reference to the medium of payment. Obviously, therefore, if there was any contract that it was payable generally in any lawful money, and not in gold coin only, it was an implied, as distinguished from an express, contract. If such implication existed in this case, it was an unexpressed term which the law reads into the contract to effectuate the actual, though unexpressed, agreement of the parties. Implied contracts are familiar to the law. The court, as has been said, will imply such a contract whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must either have been latent in, or palpably present to, the minds of both parties when the contract was made. *Brett, J., Thorn v. City of London*, L. R. 10 Exch. 123. The case of the implication of a contract to give a good title in contracts for the sale of land is an illustration of the application of this principle. So, on principles of natural justice, or to overreach covin or fraud, courts often force upon a wrongdoer the implication of a contract, although none existed in fact.

In this case the land was the subject of sale, and not the mortgage. The purchaser was notified of the existence of the mortgage and its amount. He made no inquiry as to whether it contained any special terms. He purchased subject to this incumbrance, entering into no personal obligation for its payment. The provisions in this mortgage that it should be paid in gold coin, although not present in most mortgages, was not unusual or infrequent. Such a provision is found in many corporate mortgages, and in mortgages taken by savings and other institutions. It was an important provision at a time when treasury notes or legal tenders were not convertible into coin. Law of United States, February 25, 1862; *Bronson v. Rodes*, 7 Wall. 229. Now, under the laws of the United States, the paper currency of the government and silver coins are exchangeable at the treasury for gold coin at their nominal amount; and, as shown in the opinion of Judge Ingraham, the faith of the government of the United States is pledged by solemn and repeated declarations by congress and the various departments of government to maintain the parity of all the currency issued by the government. The only hazard which the plaintiff would assume in taking the premises subject to the mortgage in question, beyond what would exist if the mortgage was payable without specification of the medium of payment, is the contingency that the United States government would violate its pledged faith, and, within the three years which the mortgage has to run, refuse to redeem its obligations in gold. We think this possibility is quite too remote to justify the assumption that the contract was made in reference to the mortgage being payable

generally in lawful currency, and not in a particular kind of lawful money. Special clauses in mortgages are not infrequent. They sometimes contain what is known as the "insurance clause," or a clause making the whole mortgage due after a specified default, and other special terms are sometimes inserted. It would not, we conceive, be a valid ground of objection on the part of a purchaser of land, subject to a specific mortgage, wherein the contract did not set out such special clauses, that they were not disclosed at the time the contract was made, if there was no deceit or misrepresentation. The contract here is sought to be avoided, not by reason of any fraud or misrepresentation, nor by reason of any variation in the subject of the sale from the description in the contract, but by reason of an incident connected with an incumbrance on the property, as to which the contract was silent, which, so far as appears, did not affect the value of the property or influence the purchaser in making his bid, and which we cannot assume, in view of the fact that the government is pledged to maintain the parity and the equal exchangeable value of treasury notes and silver and gold coin, will impose upon the plaintiff, in case the contract is completed, any additional burden. The law will not imply a contract under such circumstances that the mortgage was payable generally in any lawful currency, since whether it was or not cannot be supposed to have been a material circumstance entering into the substance of the transaction, or an efficient element in inducing the contract. The judgment should, therefore, be affirmed.

### THE LAW OF HAWKERS AND PEDDLERS.

As one of the prerogatives of municipal corporations, the taxing of itinerants offering goods for sale has presented several questions of interest, besides furnishing abundant litigation in establishing the limitations of the taxing power. It is well settled that the power to tax both employments and property may be delegated by the legislature to municipal corporations, but the tax or license imposed by such corporation must be directly authorized by the charter or by the statutes of the State.<sup>1</sup> This power, however, must be exercised by the corporation itself,<sup>2</sup> and it cannot be delegated to any other body or person, and it is strictly construed according to the charters and statutes conferring authority.<sup>3</sup> But every such ordinance to be valid must be reasonable.<sup>4</sup> Therefore, a municipal ordinance which required peddlers to pay a license not less than one nor more than twenty-five dollars for a fixed time, in the dis-

cretion of the mayor, was held invalid and void for unreasonableness, which is a question to be determined by the court.<sup>5</sup> The exercise of the power to tax is justified on the grounds that occupations like hawking and peddling may become so generally extended as to create public nuisances, and, consequently, are purely within police supervision. A stronger reason for the exercise of this power is found, however, in the idea that local resident merchants are entitled to such protection, together with an incidental return of a sufficient sum in money to the corporate treasury. Lexicographers generally agree that the word "peddler" signifies one who travels about the country carrying wares for sale in small quantities. The prevailing idea in such an occupation appears to be that the person carries his stock in trade on foot, or in a vehicle, about the country, offering the goods for sale, and then and there selling the same. A hawker is defined by Black to be a trader who goes from place to place or along the streets of a town, selling the goods which he carries with him, and a peddler to be an itinerant trader who sells small wares which he carries with him, in traveling about from place to place.<sup>6</sup> At present the terms hawker and peddler are used interchangeably.<sup>7</sup> Nearly all of the States forbid hawking and peddling without a license under penalty of a fine, forfeiture of stock of goods or other punishment. The licenses are granted by an officer or board designated for that purpose, upon application showing the manner in which the applicant intends to travel and trade, upon the payment of a specified fee.<sup>8</sup> It is also to be remembered that such a license is purely a personal privilege, the tax being on the calling, not on the goods, and, therefore, the license is not transferable.<sup>9</sup> The amount of the fee charged is fixed by law or ordinance. Although the constitutionality of laws in restraint of hawkers and peddlers has been upheld in both the State and federal courts, it is, however, absolutely essential that there be no discrimination in favor of one class and against another. Such discrimination is unconstitutional.<sup>10</sup> But an article patented is

<sup>5</sup> State v. Mayor, 37 N. J. L. 348.

<sup>6</sup> Black's Law Dict.

<sup>7</sup> Abbott's Law Dict.; Bouvier's Law Dict.

<sup>8</sup> Bouvier's Law Dict.; 2 N. Y. Rev. Stat. sec. 1292.

<sup>9</sup> Gibson v. Kauffield, 63 Pa. St. 168.

<sup>10</sup> Taunton v. Taylor, 116 Mass. 254; St. Louis v. Spiegel, 90 Mo. 587.

<sup>1</sup> Huntington v. Cheesbro, 57 Ind. 74; Wiggins v. Chicago, 68 Ill. 372; Taunton v. Taylor, 116 Mass. 254.

<sup>2</sup> East St. Louis v. Werung, 50 Ill. 28.

<sup>3</sup> Warren v. Geer, 114 Pa. St. 207.

State v. Mayor, 37 N. J. L. 348.

not exempt from the restrictions of such laws and ordinances.<sup>11</sup> There exists among the statutes of the several States, as declared in various judicial opinions, a want of unanimity in determining the necessary constituents of a hawker and peddler. The old common law definitions are in many cases not broad enough to embrace some tradesmen, who are now judicially declared to be nothing more than peddlers. In Missouri any person who deals in goods by going from place to place to sell the same is a peddler. Therefore, one who as agent of an establishment located in another State, takes one of the harrows which it has shipped into the State to an agent, and goes through the country with it, sometimes selling the single harrow outright, at other times taking written orders delivering the harrow afterwards, is a peddler.<sup>12</sup> Likewise, a person traveling from place to place in a two horse vehicle selling kitchen cabinets manufactured in the State is a peddler,<sup>13</sup> but selling goods by sample has there been held to be not included within the purport of the statute.<sup>14</sup> In order to constitute a peddler the statute contemplates that the sale and delivery of the articles must be concurrent.<sup>15</sup>

In a case of considerable importance recently decided by the New York Court of Appeals, the evidence established that the defendant had a residence and store in a village in one county and transacted business with persons in another village of an adjoining county. The vendor solicited orders and subsequently delivered pursuant to the orders certain articles, consisting of groceries for family use. He had a wagon with which, once a month, he made trips to the adjoining villages, filling the orders previously taken and receiving new orders for goods to be subsequently delivered. The Village of Stamford brought action against the defendant Fisher to recover a penalty for violation of the terms of a resolution passed by the village trustees, which prohibited all persons from hawking or peddling in the public streets without a license. In passing upon the question whether the defendant came within the definition of a peddler the court says: "The statute in coupling the terms

hawking and peddling suggests the idea that the features of itinerancy and a public offering of goods for sale are present in the occupations of the hawker and the peddler. Either one avails himself of the highway for the conduct of his trade in and about the same manner." In the case of the defendant, he resided in a different part of the State and presumably contributed his share to the discharge of the public burden of taxation. He did not hawk or cry out his wares in the public streets, nor did he dispose, offer, or sell them thereon. He simply delivered at the houses of customers from whom he had previously received orders, the articles ordered. The concept of such an occupation sharply distinguishes it from that of the itinerant street vendor.<sup>16</sup> This decision follows closely the principle laid down in *Rex v. McKnight*, where the defendant was in the employ of a tea dealer. The master sent him to a neighboring county soliciting orders and on subsequent occasions he was sent to deliver small parcels of tea, in pursuance of these orders. This was held not to be exposing for sale or offering for sale, within the meaning of the hawker's and peddler's act, so as to subject the defendant to a penalty for trading without a license.<sup>17</sup> Similarly the Alabama courts have decided that a salesman who goes from house to house carrying with him a sample stove and at the same time takes orders that are subsequently filled, by delivery of other stoves than the one carried as a sample, does not come within the inhibition of the statute.<sup>18</sup> A solicitor employed by a resident mercantile establishment to call on citizens and solicit orders for goods, and who usually carries samples, is not a peddler, within the meaning of the Iowa statute imposing a fine for hawking and peddling without a license.<sup>19</sup> In the same State the restriction has been so far extended as to include a duly authorized, practicing physician and surgeon who possessed a certificate required by the Iowa statute, and who had made proper record of his certificate both in the county of his residence and in the other counties of the State, who attempted to sell his own medicines prepared by himself from a private formula, by traveling from town to

<sup>11</sup> *Com. v. Fenton*, 139 Mass. 195.

<sup>12</sup> *State v. Snoddy*, 31 S. W. Rep. 36.

<sup>13</sup> *State v. Holmes*, 62 Mo. App. 179.

<sup>14</sup> *Burbank v. McDuffie*, 65 Mo. 135.

<sup>15</sup> *State v. Hoff*, 50 Mo. App. 585.

<sup>16</sup> *Village of Stamford v. Fisher*, 140 N. Y. 187.

<sup>17</sup> *Rex v. McKnight*, 10 B. & C. 784.

<sup>18</sup> *Ballow v. State*, 87 Ala. 144.

<sup>19</sup> *City of Davenport v. Rice*, 39 N. W. Rep. 191.

town exhibiting and offering for sale to all persons desiring to buy. It was held that the right to dispense his own prescriptions and to remove to another county and practice medicine by having his certificate recorded, did not give him the right to pursue the business of an itinerant vendor, and that he should be subjected to the imposition of the license tax, the same as an itinerant vendor of any other article. The fact that a physician has the right to practice medicine and surgery anywhere in the State, gives him no authority to become an itinerant vendor of medicines, although made by himself, without payment of the statutory license. The law applies to all trades and professions alike, and the only point to be determined in each case is, whether or not the person brings himself within the meaning and definition of the statutes concerning peddlers and hawkers.<sup>20</sup> In Georgia, a lightning-rod agent who sells no rods without putting them up and charges by the foot for the work in putting up or repairing the rods, is not subject to the provisions of the statute requiring a license from those who peddle.<sup>21</sup>

Pennsylvania has a general statute prohibiting the sale by peddlers, hawking or traveling merchants of any foreign merchandise, but the act is not held to apply to persons hawking or peddling goods of their own manufacture. This has been construed to protect the agents of manufacturers as well as the manufacturers themselves. Traveling agents of wholesale houses who go from place to place exhibiting samples and selling goods by sample for wholesale houses, and who do not deliver the goods at the time the orders are taken, are not within the ordinance imposing a tax in any of the several States.<sup>22</sup> Agents who solicit orders and take measurements for the making of shirts, and book canvassers who solicit subscriptions for books for future delivery, are not obliged to obtain a license, since such canvassers are neither hawkers nor peddlers.<sup>23</sup> In the District of Columbia the fact that a person who sells small wares from house to house and delivers them at the time of sale, is paid a salary instead of receiving a profit by way of percentage or otherwise, from the sale of the in-

dividual articles, does not exempt him from the statutory provisions, and he is subject to the license tax prescribed.<sup>24</sup> In the case cited the person against whom the statute was enforced was a salaried agent of the manufacturers. A traveling troupe consisting of a physician, a comedian and others, who hired a hall for two weeks, and held entertainments therein to advertise a patent medicine and sold bottles thereof after the entertainment, have been held itinerant vendors in Massachusetts.<sup>25</sup> The English rule has been limited so as to exempt a selling for philanthropic or religious purposes. Where, therefore, some ladies purchased materials, made articles therefrom, and in each town for one month carried the articles about in baskets from house to house soliciting sales and delivering the articles, and the profits were devoted to a village school and a religious purpose, the sellers were held not to be either hawkers or peddlers.<sup>26</sup> However, the fact that a vendor has violated an ordinance and subjected himself to fine or imprisonment is no defense in an action to recover the purchase price of the articles sold. Therefore, where the plaintiffs, residing in the State of New York, forwarded goods to the defendant in the State of Maine, on an order procured by a traveling agent, who was unlicensed, it was held that although the agent's acts were in violation of law in selling without a license, yet the purchaser could not set up the agent's violation of the statute as a defense in a suit to recover the purchase price of the goods sold.<sup>27</sup> Likewise in Maryland it has been held that the statute inflicting a penalty against hawkers and peddlers selling without license is a revenue statute merely, not prohibitive, and does not render void a note given for the purchase price of goods bought of a peddler, although he may have acted in violation of law.<sup>28</sup> In a prosecution for selling goods without due permission, pursuant to such statutes, the burden is on the defendant to prove his license.<sup>29</sup> And where a person admits the charge and has no license, the burden is on him to prove that he comes within the exemption of the general prohibi-

<sup>24</sup> *In re Wilson*, 19 D. C. 341.

<sup>25</sup> *Com. v. Newhall*, 164 Mass. 338.

<sup>26</sup> *Gregg v. Smith*, 8 L. R. Q. B. 802.

<sup>27</sup> *Burbank v. McDuffie*, 65 Me. 135.

<sup>28</sup> *Banks v. McCosker*, 82 Md. 518.

<sup>29</sup> *State v. Parsons*, 124 Mo. 436.

<sup>20</sup> *State v. Goerss* (Iowa), 51 N. W. Rep. 1147.

<sup>21</sup> *Ezell v. Thrasher*, 76 Ga. 817.

<sup>22</sup> *Com. v. Brinton*, 132 Pa. St. 69.

<sup>23</sup> *City of Elgin v. Picard*, 24 Ill. App. 340.

tion against peddling without a license, in favor of goods which are of the peddler's own manufacture or are the product or manufacture of the State.<sup>30</sup> An applicant for a hawker's license, who is refused unless he will pay an excessive and illegal fee, or against whom there is applied an unfair and unjust discrimination, may have a *certiorari* to review the proceedings.<sup>31</sup>

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<sup>30</sup> Com. v. Brinton, 132 Pa. St. 69.

<sup>31</sup> State v. City of Orange (N. J.), 13 Atl. Rep. 240.

#### QUITCLAIM DEED — COVENANT — AFTER-ACQUIRED TITLE.

BENNETT v. DAVIS.

*Supreme Judicial Court of Maine, June 19, 1897.*

Under a quitclaim deed containing a covenant of special warranty "against the lawful claims and demands of all persons claiming by, through, or under" the grantor, a title or interest subsequently acquired by the grantor does not inure to the grantee.

The petitioner claimed one undivided sixth of the premises described. The defendant denied the title of the petitioner, and claimed to own the whole premises.

Three brothers, Elbridge, Henry, and Joseph, were once seised of the premises, one-third each.

Elbridge gave a deed to Henry, wherein, he says: "I do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Henry, his heirs and assigns, forever, a certain lot of land with the buildings thereon (describing the premises of which partition is sought,—a copy of the deed made a part of the case is given below), to have and to hold," etc., and warranting the premises against all claims "by, through, or under him."

Thereafterwards, Joseph, being seised of one-third, died, and Elbridge and Henry inherited one-twelfth each, and purchased all the interest of the other heirs in Joseph's lands, giving them one-sixth each in the premises described. This one-sixth Elbridge conveyed to the petitioner, and he now holds the same unless it inured to Henry, the grantee of Elbridge, under the deed before mentioned, purporting to convey the whole land, in which case the petitioner had no title, and the defendant owned the whole; otherwise five-sixths.

Upon the above statement the case was reported to the law court for decision. Judgment for petitioner.

Deed: "Know all men by these presents, that I, Elbridge G. Bennett, of Deering, in the county of Cumberland, and State of Maine, in consideration of the sum of one dollar, paid by Henry P. Bennett, of said Deering, the receipt whereof I

do hereby acknowledge, do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Henry P. Bennett, his heirs and assigns, forever, a certain lot of land, with the buildings thereon, situated in said Deering, on the southwesterly side of the road leading from Stroudwater village to Portland; being the same premises conveyed to Henry P. Bennett, Joseph J. Bennett, and Elbridge G. Bennett, by Andrew Gray, by deed dated March 24, 1864, recorded in Cumberland Registry of Deeds, Book 326, page 534, to which reference may be had for a particular description.

"To have and to hold the same, together with all the privileges and appurtenances thereunto belonging, to him, the said Henry P. Bennett, his heirs and assigns, forever. And I do covenant with the said grantee, his heirs and assigns, that I will warrant and forever defend the premises to him, the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons claiming by, through, or under me.

"In witness whereof, I, the said grantor, and Sarah S. Bennett, wife of the said Elbridge G., in testimony of her relinquishment of her right of dower in the above-described premises, have hereunto set our hands and seals this ninth day of March, in the year of our Lord, one thousand eight hundred and seventy-eight.

"Elbridge G. Bennett. [Seal.]

"Sarah S. Bennett. [Seal.]

"Signed, sealed, and delivered in presence of Andrew Hawes."

EMERY, J. One Elbridge G. Bennett acquired by inheritance and deed a title to one undivided sixth of the premises sought to be divided. After acquiring that title, the only conveyance he made of the premises was by his deed to the petitioner. But before he acquired any title to this one-sixth he executed and delivered to Henry Bennett the deed set out in full in the case. This last-named deed was recorded on the day of its date, but it does not appear that the petitioner had any notice of it other than what constructive notice such record would impose upon him. Which grantee is protected under our laws? The petitioner, the later grantee, relies upon the principle of the registry law. The respondent, claiming under the earlier grantee, relies upon the principle of estoppel.

The two principles certainly conflict. This conflict is frankly acknowledged in forcible language, but ingeniously avoided, in *Society v. Cutting*, 50 Conn. 118. The court said: "If we were called upon to decide this question, we should regard it as one of very serious difficulty, inasmuch as in sustaining the later deed we should have to deny the controlling application to the case of the well-settled principles of estoppel, while in sustaining the prior deed we should have to violate the entire spirit of our registry system, which it is the policy, and we may say, in every other case, the unyielding policy, of the law to sustain."

The spirit of the system of registry of deeds in this country is that, when a title has been traced to a party, the search for conveyances or incumbrances made by him may begin at the date of his accession to the rule. *Calder v. Chapman*, 52 Pa. St. 359; *Loan Co. v. Maltby*, 8 Paige, 361; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Doswell v. Buchanan*, 3 Leigh, 365; *Buckingham v. Hanna*, 2 Ohio, 551, 557; *Wade*, Notice, § 214; *Rawle*, Cov. 428; *Hare's* notes to the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. p. 626; note to *Society v. Cutting*, 50 Conn. 122. In *McCusker v. McEvery*, 9 R. I. 528, the court felt constrained by authority to give effect in that particular case to the doctrine of estoppel, but said, "We think a statute is called for in view of this state of the law in order to carry into full effect the policy of our recording act, and to prevent its operating in cases of this kind as a snare, rather than as a protection, to purchasers."

On the other hand, it has been several times held in this State, rather upon authority than reason, that where one has assumed to convey by what is known as a full warranty deed, with warranty against all the world, a parcel of land he did not own, any title afterwards coming to him will inure at once to his former grantee. *Lawry v. Williams*, 13 Me. 281; *Baxter v. Bradbury*, 20 Me. 260; *Crocker v. Pierce*, 31 Me. 177; *Powers v. Patten*, 71 Me. 583. In the last case cited the court said the rule had been severely criticised in some quarters, but it had become the settled law of this State.

In *Fairbanks v. Williamson*, 7 Me. 96, the rule of estoppel was applied to the case of a deed containing a covenant of non-claim; *i. e.*, a covenant that the grantor, his heirs and assigns, should never have or make any claim to the conveyed premises. In *Pike v. Galvin*, 29 Me. 183, however, the court, in an elaborate opinion, overruled in terms the former case of *Fairbanks v. Williamson*, and held that the rule of estoppel should not be applied to a deed with a covenant of non-claim, although the covenant embraced all persons claiming under the grantor or his heirs. The decision in *Pike v. Galvin* has been repeatedly and distinctly affirmed. *Partridge v. Patten*, 33 Me. 483; *Loomis v. Pingree*, 43 Me. 314; *Harriman v. Gray*, 49 Me. 538; *Read v. Whittemore*, 60 Me. 481.

There are also cases holding that the rule does not apply to any covenants, however full and strong, in a deed purporting to convey only the grantor's present right, title, or interest. *Coe v. Persons Unknown*, 43 Me. 432; *Ballard v. Child*, 46 Me. 152. The covenants in these cases were held to apply only to the particular right, title, or interest then conveyed, and not to any after-acquired title.

Thus we find the law settled in this State as to three classes of deeds: (1) Those of full warranty against all the world; (2) those with the covenant of non-claim; and (3) those which purport in terms to convey only the grantor's ex-

isting right, title, or interest. Under deeds of the first class, an after-acquired title inures to the grantee. Under deeds of the second and third classes, an after-acquired title does not pass to the grantee.

But there seems to be a criterion which, for the purpose of this opinion, may reduce the above-named three classes to two: (1) Those in which appears an intent to convey an actual estate, and protect it against all the world; and (2) those in which appears the intent to merely transfer whatever estate the grantor then has, with a guaranty against any then conflicting conveyances or incumbrances. A grantor in a deed of the first class, having assumed to convey an actual estate, and to make it good in the grantee, cannot afterwards acquire and hold that estate against his grantee, nor convey it to the detriment of his grantee. He is bound by his covenant to transfer it to his grantee, and the law, as settled in this State, to save circuity of action, holds it to be thus transferred *ex vigore legis*, even against a subsequent grantee, where the first deed was recorded. A grantor in a deed of the second class, not having assumed to convey an actual estate, and to make it good against all claims, but only to relinquish whatever estate he may have with a guaranty that he has not given any one else any claim to it, is not bound to make any other title or estate good to the grantee. If at the time of his deed he has suffered no one else to acquire any rights or claims under him, there can be no breach of his covenant. After such a deed, he is free to acquire other titles or estates in the same land, and hold them against his grantee, for he never covenanted against such titles or estates, but only against the title or estate he conveyed, whatever it was.

The particular deed in this case clearly is within the second class last above described. In it there appears no intent to convey and make good an actual estate. It contains the usual language of a deed of quitclaim. It contains no assertion that the grantor has or will convey any actual estate. There is no covenant for such an estate. The covenant is that the grantor had not then given anybody any inconsistent right or claim; that the grantee need not look for prior conveyances or incumbrances, but could look to his grantor to protect him from such.

The grantor is not bound by that covenant to acquire or extinguish for his grantee any title, estate, or incumbrance outstanding in other persons, not created or suffered by him. If the grantee should be obliged to buy them in, or extinguish them, to protect his estate, that would be no breach of the covenant. Such outstanding claims in other persons, not created by the grantor, are without the purview of the covenant. Either party may acquire them. If the grantor acquire them, he is not obliged to transfer them to his grantee, and the law does not so transfer them.

The only case in Maine that we find with a

deed like this is *White v. Erskine*, 10 Me. 306. There one Moody conveyed to one Young "by deed of quitclaim with special warranty," but he had prior thereto mortgaged the premises to Stebbins and Otis. Subsequently to his deed to Young he acquired the interest he had before conveyed to Stebbins. It was held that this interest inured to his grantee, Young. It was an interest he had himself created, and one he had warranted against. It was a "lawful claim by, through, or under him." The grantor in the deed in the case at bar could not acquire or hold or convey an estate or interest he had himself created before his deed, but any other estate or interest he was free to acquire and convey.

Judgment for the petitioner for one undivided sixth part of the land, and for partition accordingly.

**NOTE—Recent Decisions on the Rights of Purchasers by Quitclaim Deeds.**—A purchaser by quitclaim deed, and for a nominal consideration, cannot claim the protection of a *bona fide* purchaser. *Lumpkin v. Adams* (Tex.), 11 S. W. Rep. 1070. A trustee's deed recited that the grantee, being the highest and best bidder at the sale, "bid for the tract first herein-after mentioned the sum of \$50." The deed then conveyed, in consideration of \$50, several distinct tracts, all of which were included in the trust deed. Held that, as against a purchaser by quitclaim from the original owner with knowledge of the trust deed, and constructive notice of the proceedings under it, plaintiff, claiming under the grantee in the trustee's deed, could show that all of the tracts were in fact advertised and bid for by such grantee, and sold to and intended to be conveyed to her by the trustee, and that the recital quoted above was so drawn by a mistake of the scrivener. *Bradford v. Carpenter* (Colo.), 21 Pac. Rep. 908. Purchasers who take by quitclaim deed are not *bona fide* purchasers, and take only the interest which their grantors had. *Peters v. Cartier* (Mich.), 45 N. W. Rep. 73. One who takes under a quitclaim deed is not entitled to the protection of a court of equity, as an innocent purchaser, for value. *Laurens v. Anderson* (Tex.), 1 S. W. Rep. 379. A person claiming to own land under a quitclaim deed executed to him is bound to take notice of all superior titles to the land which might have been discovered by proper inquiry. *Goddard v. Donaha* (Kan.), 22 Pac. Rep. 708, 42 Kan. 754. The title conveyed by a quitclaim deed is subject to all existing equities valid against the grantor; and Ann. Code Oreg. sec. 1356, providing for the recording of deeds, does not avoid a prior conveyance in favor of a quitclaim deed which is first recorded. *American Mortg. Co. v. Hutchinson* (Oreg.), 24 Pac. Rep. 515. Though Code Iowa, sec. 1941, provides that no instrument affecting real estate shall be of any value as against subsequent purchasers, for valuable consideration, without notice, unless recorded, etc., an unrecorded bond for title takes precedence of a subsequent quitclaim deed, since the grantee therein cannot be regarded as a purchaser without notice. *Steele v. Sioux Valley Bank* (Iowa), 44 N. W. Rep. 564. Where a vendee, on finding that the deed under which his vendor claims title is in reality a mortgage, procures a quitclaim from the mortgagor, and then conveys to a third person without notice, such third person takes good title as against the mortgagor, though the quitclaim was in fact only another mortgage. *McDaid v.*

*Call*, 111 Ill. 298. A person who takes a quitclaim deed of land then in the actual possession of the tenants of one who has a prior, though unrecorded, conveyance from the other's grantor, is chargeable with notice of such adverse claim, and is not a *bona fide* purchaser. *Wolf v. Zabel* (Minn.), 46 N. W. Rep. 81, 44 Minn. 90. J, who had a contingent equitable interest in real estate, made a quitclaim deed thereof to P, who conveyed to defendants, before the estate became vested. Afterwards he gave B, who conveyed to complainant, a warranty deed thereof, and, after the vesting of the estate, he made another deed to defendants, confirming his prior quitclaim deed, and the trustee, holding the legal title, also conveyed to them said J's interest. Held, that the estate given to J was a contingent remainder; and J's quitclaim deed to P will be upheld in equity as an executory agreement to convey the estate when acquired. *Wilcox v. Daniels*, 3 Atl. Rep. 204, 15 R. I. 261. A quitclaim deed, duly recorded, taken by the purchaser in good faith and for a valuable consideration, will prevail over a prior unrecorded deed, where the purchaser had no notice of the former deed, and could not have discovered its existence by an investigation of the public records, or by making examinations and inquiries, the grantor having forgotten the execution of the former deed, and having executed a quitclaim instead of a warranty deed, because of outstanding tax titles. *Merrill v. Hutchinson* (Kan.), 25 Pac. Rep. 215, 45 Kan. 59. A purchaser by quitclaim deed of land held by a wife, as her separate estate takes subject to the equitable lien of a debt contracted by her husband made a charge on the land, though the instrument by which the charge was created is not recorded. *Hope v. Blair* (Mo.), 16 S. W. Rep. 595. A purchaser of real estate in Arkansas is not charged with notice of prior equities not of record, merely because his deed is in the form of a quitclaim, if it does not appear that he directed a deed of that kind. *McDonald v. Belding*, 18 S. C. Rep. 892, 145 U. S. 492. The rule that a purchaser by a quitclaim deed is not to be regarded as a *bona fide* purchaser without notice of a prior incumbrance has no application where the registry laws require the recording of such incumbrance in order to make it a lien on lands in the hands of a subsequent purchaser. *White v. McGarry*, 47 Fed. Rep. 420. Where, after the execution of a mortgage on a lot and the buildings thereon, the buildings are removed to another lot without the mortgagee's consent, the mortgagee, or a *bona fide* assignee of the mortgage, does not lose his lien thereon, as against one claiming under a sale and conveyance by quitclaim deed from the mortgagor, though such purchaser may have had no knowledge that the buildings were so removed. *Partridge v. Hemenway* (Mich.), 50 N. W. Rep. 1084, 89 Mich. 454. One who receives a quitclaim deed for land is presumed to take it with notice of all outstanding interests and claims of which he could obtain knowledge by the exercise of reasonable diligence, in the examination of all of the public records affecting the title, and from inquiries which he might make of persons whom the records show had redeemed the property from tax sale and had paid subsequent taxes thereon, or were otherwise ostensibly interested in the property. *Smith v. Rudd* (Kan.), 29 Pac. Rep. 310. Where defendant, an attorney, purchases an outstanding title to land held by plaintiff, the title to which defendant had examined for plaintiff, he holds in trust for plaintiff; and a purchaser from defendant under a quitclaim deed holds the title subject to all the equities existing between defendant and plaintiff, though he had no notice of

the trust relation existing between them. *Eoff v. Irvine* (Mo. Sup.), 18 S. W. Rep. 907. A vendee of land executed a mortgage for the deferred purchase money, and the vendor executed a warranty deed, and placed it in escrow, to be delivered to the vendee on the payment of the mortgage. Held, that one who, with actual knowledge of the existence of the mortgage, takes a quitclaim deed from the vendor, is chargeable with knowledge of the vendee's rights and takes nothing by his quitclaim deed, where the vendee subsequently pays the mortgage, and secures a release from the vendor. *Pleasants v. Blodgett* (Neb.), 49 N. W. Rep. 453, 32 Neb. 427. Where a person solicits and takes a quitclaim deed for a comparatively small consideration from the record owner of the land, who has made no claim to the same for more than 20 years, and paid no taxes, and knows at the time that persons are in possession of the land, claiming under a certain person, and expects a lawsuit with them, he cannot be considered a *bona fide* purchaser, so as to defeat the equitable rights of the parties in possession arising from a sale to the person under whom they claim, made by an agent of the record owner, under a defective power of attorney. *Hersey v. Lambert* (Minn.), 52 N. W. Rep. 963. One who accepts a quitclaim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title. *Bowman v. Griffith*, 53 N. W. Rep. 140, 39 Neb. 361. A remote grantee of a trustee holding the legal title to land is not affected by the trust as a *bona fide* purchaser because some of the mesne conveyances through which he derives title are mere releases or quitclaims, except that they contain the usual *habendum* clauses. *Finch v. Trent* (Tex. Civ. App.), 22 S. W. Rep. 132. The receipt of a quitclaim deed does not of itself prevent the grantee from showing that he is a *bona fide* purchaser. *Moelle v. Sherwood*, 13 S. C. Rep. 426, 148 U. S. 21. Though the word "quitclaim" is used in a deed, yet, where it purports to convey the land itself, and not the mere right or title of the grantor, and the grantee pays the purchase money without notice, he will be protected, as a *bona fide* purchaser, against a prior unrecorded conveyance. *Dycus v. Hart* (Tex. Civ. App.), 21 S. W. Rep. 299. A deed from an assignee for the benefit of creditors is not a quitclaim in such sense that the vendee cannot be a *bona fide* purchaser. *Cantrell v. Dyer* (Tex. Civ. App.), 25 S. W. Rep. 1098. One holding land under a quitclaim deed is not a *bona fide* purchaser in respect to outstanding titles of record, or discoverable by due diligence. *Pleasants v. Blodgett* (Neb.), 58 N. W. Rep. 423. A deed indorsed "a quitclaim deed" which, in terms, bargains, sells, and quitclaims, for a very inadequate consideration, all interest, as appears from a certain sheriff's deed, having an *habendum* clause in the usual form, but concluding, "so neither H, grantor, or my heirs nor any person . . . claiming under me, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises," is only a quitclaim, and, therefore, will not support a title depending alone on a *bona fide* purchase. *Finch v. Trent*, 24 S. W. Rep. 679, 3 Tex. Civ. App. 568. Under the recording act, protecting "purchasers for a valuable consideration without notice," a grantee in a deed conveying all of the right, title, and interest of the grantor cannot claim, as against the actual owner, an interest standing of record in the grantor's name, as the grantee was a purchaser only of the grantor's interest. *Rogers v. Chase* (Iowa), 56 N. W. Rep. 537. An unrecorded conveyance takes precedence of a subsequent quitclaim deed by the same grantor which is duly recorded. *Wickham v. Henthorn* (Iowa), 50 N.

W. Rep. 276. In Florida the grantee in a quitclaim deed is not regarded as an innocent purchaser without notice. *Fries v. Griffin* (Fla.), 17 South. Rep. 66. A deed by which the grantors sell and release, and forever quitclaim, all their right, title, and interest in certain land to another, to have and to hold unto him, his heirs and assigns, "so that neither we nor the grantors, nor our heirs, nor any person or persons claiming under us, shall at any time hereafter have, claim, or demand any right or title to" the land is a mere quitclaim deed, and charges the grantee with notice of equities. *Threadgill v. Bickerstaff*, 29 S. W. Rep. 757, 87 Tex. 520. While it is held, in Texas, that one taking under quitclaim deed of his grantor's interest only is affected with notice of all defects in the title, yet mere knowledge that the deed is in that form does not affect the title of one claiming under a subsequent warranty deed from the grantee. *Stanley v. Schwalby*, 16 S. C. Rep. 754, 162 U. S. 255. One not in possession of land and not seized of it, for the reason that he had given an unrecorded deed thereof to complainant, and disclaiming any interest in it, when asked by defendant to sell, though not stating that he had given complainant a deed, finally agreed to give defendant a deed of any interest he had in it, and executed to him a deed purporting to convey the entire fee, reciting that he "bargained, sold, quitclaimed, and conveyed," held that, as against complainant, it would be treated as a quitclaim, and would not protect defendant as a *bona fide* purchaser. *Webb v. Elyton Land Co.*, 18 South. Rep. 178, 105 Ala. 471. A purchaser by quitclaim deed is entitled to protection against a prior, but subsequently recorded, deed, under 1 Rev. Stat. p. 756, sec. 1, providing that every unrecorded conveyance shall be void as against a subsequent purchaser in good faith and for value of the same property whose "conveyance" shall be first duly recorded. *Wilhelm v. Wilken* (N. Y. App.), 44 N. E. Rep. 82, 149 N. Y. 447. A deed reciting that the grantor has "bargained and sold unto the said J H J all my right, title, and interest, . . . to have and to hold unto him, the said J H J, his heirs and assigns, forever . . . and hereby warrant the title of said land," is a quitclaim deed. *Culmell v. Borroum* (Tex. Civ. App.), 35 S. W. Rep. 942. The question whether a purchaser by quitclaim deed is entitled to protection as a *bona fide* purchaser without notice of defects is exhaustively considered in article by B. R. Webb, Esq., 34 Cent. L. J. 174.

## JETSAM AND FLOTSAM

### MUNICIPAL CORPORATIONS—LIABILITY FOR CONDITION OF JAIL.

The confinement of a prisoner in an iron or steel courthouse with a tin or zinc floor covered with ice, and with broken windows, during a bitter cold, windy night, in which he suffers intensely and has his feet badly frost bitten, is held, in *Shields v. Durham* (N. Car.), 36 L. R. A. 293, 24 S. E. Rep. 794, to give him a right of action against the town, when the authorities had long known of the condition of the prison.

This case seems to run counter to both principle and authority. The accepted doctrine in the American courts is that a municipal corporation is not liable for failure to exercise its governmental powers or for the defaults of its officers and servants in the administration of its governmental functions.

The maintenance of a jail is clearly a public duty, and one exercised by the city, not for the special and

private advantage of the municipality, but peculiarly in the interest of the public, for the public good, and as a part of the governmental machinery of the State. The precise question as to the liability of a municipal corporation for injury to the person or health of prisoners, resulting from the condition of the city jail, or the tortious acts of those in charge thereof, has frequently been the subject of judicial determination, and, as far as we are aware, the North Carolina case stands solitary and alone, in holding that an action may be maintained against the corporation in such case, in the absence of a statute authorizing it. There is a Louisiana case so holding, but that probably rests upon the peculiar doctrines of the civil law; certainly it has not been followed in the other States. *Johnson v. Municipality*, 5 La. Ann. 100. The following cases are directly opposed: *Blake v. Pontiac*, 49 Ill. App. 548; *Attaway v. Cartersville*, 68 Ga. 740; *Lindley v. Polk County (Iowa)*, 50 N. W. Rep. 975; *Commissioners v. Boswell (Ind.)*, 30 N. E. Rep. 534; *New Kiowa v. Craven (Kan.)*, 26 Pac. Rep. 426; *La Clef v. Concordia (Kan.)*, 13 Am. St. Rep. 285. And the authorities make no distinction between cases where the charge upon which the prisoner is confined is one involving a breach of the criminal laws of the State and where the charge consists in a breach of the local city ordinances.

See further 2 *Dillon Munic. Corp.* 961-980. In *City of Richmond v. Long*, 17 Gratt. 375, it was held that the City of Richmond was not responsible for the death of a slave, due to the negligence of the employees of a small-pox hospital, conducted by the city. The decision is based on the ground that the hospital was conducted as a governmental function. So a city is not liable for personal injuries sustained by one prisoner at the hands of another, through the negligence of the officials in charge. (*Doster v. Atlanta*, 72 Ga. 233; *Davis v. Knoxville [Tenn.]*, 18 S. W. Rep. 254); nor for the death of a prisoner by the burning of the jail, though the fire was caused by the negligence of the city officers (*Bryan v. Guyandotte [W. Va.]*, 13 S. E. Rep. 707); nor for assault or wrongful arrest by its police officers. *Harris v. Atlanta*, 62 Ga. 290; *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Corsicana v. White*, 57 Tex. 382; 2 *Dillon Munic. Corp.* (4th Ed.) 975. A full collection of authorities on the general subject of the liability of municipal corporations for the torts of their officers and agents, will be found in an admirable note by Mr. H. Campbell Black, in 14 C. C. A. 534-547, and in a still more elaborate note to *Goddard v. Inhabitants, etc. (Me.)*, 30 Am. St. Rep. 376-413.—*Virginia Law Register*.

#### EVIDENCE OF OTHER CRIMES THAN THE ONE CHARGED.

The case of *People v. Zucker*, 46 N. Y. Supp. 706, recently decided by the Supreme Court of New York, suggests, if it does not actually raise, an interesting and difficult point in the law of evidence. At the trial of the defendant for arson, consisting in the burning of a building in New York, the judge allowed the government, for the purpose of corroborating its principal witness, to put in evidence tending to prove that the defendant was guilty of previously willfully setting fire to a building in Newark, N. J. The supreme court, by a vote of three to two, held that this was not reversible error. The material facts were as follows: The furniture in the New York building had been removed to that in Newark, the fires took place within three days of each other, and the motive in both cases was to defraud the insurance companies. Relying on these facts the majority held that the two crimes were part of one and the same scheme, each

being the supplement of the other, and neither being complete alone. The minority, in the able opinion of Ingraham, J., deny that the two crimes were connected otherwise than as crimes of a similar nature committed for a similar purpose.

The decision of the majority, on their interpretation of the facts, would seem to be sound. Evidence of a previous crime connected with the actual commission of the one charged, in the sense of making the latter easier, safer, or more effective, was admitted in *Commonwealth v. Robinson*, 146 Mass. 571, and the principle is recognized in *People v. Sharp*, 107 N. Y. 427, 466. And in this connection may be repeated the example often given, that where one commits larceny of a weapon with which to do murder, evidence of the larceny may come in during the murder trial. The point raised by the minority opinion, however, presents a more difficult question. May evidence of crimes other than the one charged and unconnected with it, but of a precisely similar nature and done for a precisely similar purpose, be admitted to prove the crime charged, if not unreasonably separated in time? It is necessary to understand exactly the limits of the problem. Acts such as are suggested in the question certainly come under the general description of acts done for a common purpose. It is to be noted, however, that the ultimate purpose or result is not the final crime, the one for which the defendant is being tried, but a fixed and constant quantity outside of all the crimes, and having an equal influence on each. In *People v. Zucker, supra*, for instance, the constant quantity is the scheme to obtain insurance money generally; the similar acts are willfully setting fire to buildings insured. Evidence of the sort under consideration has been admitted to show intent where it determines the nature of the specific act; as whether false representations were made knowingly or not (*Reg. v. Francis*, L. R. 2 C. C. R. 128); or whether a building was fired by design or accident. *Commonwealth v. McCarty*, 119 Mass. 354. Should it ever come in as tending to prove the crime itself by means of bringing out more strongly the probable motive when there is no question as to the character of the act? The rule that what merely tends to show the defendant to be a bad man, likely to commit crime, is inadmissible, rests on obvious considerations of justice, and is not to be questioned. Whether evidence of similar acts, near in point of time, unconnected with each other, but all traceable to the one fixed purpose, must be always rejected as falling under this general rule, is in the present state of the authorities worthy the serious consideration of those who try criminal cases.—*Harvard Law Review*.

#### ELIGIBILITY OF WOMEN TO OFFICE.

The advocates of equal political rights for women will find encouragement in the recent decision of the Supreme Court of Missouri in *State ex rel. Crow v. Hostetter (Mo.)*, 37 L. R. A. This court held that a woman is eligible to election as county clerk, although the State constitution and statutes use masculine pronouns when referring to such officers, where the constitution has dropped the word "male" from the statement of qualifications for such officers, but retained it in the case of some higher officers. The decision was rendered by the first division of the supreme court, all the members of which concur in the opinion by Chief Justice Barclay. While the decision is doubtless more liberal toward the rights of women than decisions of some other courts have been, it is to be noticed that one important element in the interpre-

tation of the constitution on the subject was the fact that the word 'male' had been dropped from the constitutional provision respecting this office, but retained in reference to some other offices.

The court refers to the fact that the office is a ministerial one which admits of the use of a deputy, and that its duties "are not of such a nature as to be incompatible of discharge by a woman," and then says: "In view of the condition of the positive law of Missouri above described, we do not consider it necessary to enter into a discussion of the eligibility of women to office at common law or in other States of the Union."

The common law of the subject presents a paradox. The accepted common law doctrine is against the eligibility of women and the common law decisions are all in favor of it. In every reported case prior to the present generation in which a woman's right to hold a particular office was questioned the right was sustained. The theory that women are incompetent at common law to hold office must be based on the fact that they did not actually take office except in rare instances, and that these instances were usually treated by the judges and law writers as exceptional. But there is quite an array of cases in which the incumbents of offices were women, and their competency was invariably sustained.

A list of the offices that women have held in England includes quite a variety. Aside from the notable fact that some of the greatest rulers of the nation have been women, it appears from Campbell's Lives of the Lord Chancellors that Queen Eleanor was appointed lady keeper of the great seal, and performed the judicial as well as the ministerial duties of the office, so that Lord Campbell says: "I am thus bound to include her in the list of the chancellors and keepers of the great seal." The Countess of Pembroke, Dorset, and Montgomery sat with other judges on the bench in the exercise of the duties of her office of hereditary sheriff. Lady Suffolk is shown in the year books (8 Edw. IV. 1) to have rendered an award as arbitrator, and it does not appear that any question was raised as to her competency or that this was deemed to be unusual. Other offices held by women are described in various cases as those of keeper of prison, keeper of workhouse, governor of workhouse, custodian of castle, overseer of the poor, sexton of the parish, forester, commissioner of sewers, constable of England, marshal of England, great chamberlain of England, and marshal of the Court of King's Bench. Some of these offices were hereditary, but not all of them, and sometimes the women who held them exercised their functions by deputy. It is also doubtless true that some of these offices were obscure, and were exercised, in the words of an English judge, "in a remote part of the country where nobody else could have been found who could exercise them." But the fact remains that in all this variety of offices that were held by women whenever a contest of the right of the women to the office was made her right was sustained, although in some of the cases the judges based their decisions on the fact that the office was hereditary or its functions exercisable by deputy, and in general they seem to regard the holding of office by women as exceptional. From these facts has come the curious result that all the common-law decisions on contests of the right of women to office were in favor of their right, while the accepted common-law doctrine is against their right.

Some actual decisions against the rights of women have been rendered in recent years. But the recent

authorities are not all against them, as appears in a note to the Missouri case above referred to. It may be fairly said to be the prevailing doctrine, both in England and America, that women are ineligible to any important office except when made so by enactment. Such an enactment is to be found in the Missouri case, in broadening the provision as to qualifications by dropping the word "male." Some of the statutes expressly provide that words of the masculine gender shall include women. It is unquestionably the tendency both of the statutes and the decisions to extend the rights of women in this respect. —Case and Comment.

#### BOOKS RECEIVED.

Century Edition of the American Digest. A Complete Digest of all Reported American Cases from the Earliest Times to 1896. Vol. 1, Abandonment—Advocate. St. Paul: West Publishing Co., 1897.

Commentaries on the Law of Trusts and Trustees, as Administered in England and in the United States of America. By Charles Fisk Beach, Counsellor at Law. In Two Volumes. St. Louis: Central Law Journal Company, 1897.

A Manual for Notaries Public, General Conveyancers, Commissioners, Justices, Mayors, Consuls, etc., as to Acknowledgments, Affidavits, Depositions, Oaths, Proofs, Protests, etc., for each State and Territory, with Forms and Instructions. Second Revised Edition, by Florian Glauque, A. M. of the Cincinnati, Ohio, Bar. Cincinnati: The Robert Clarke Company, 1897.

#### HUMORS OF THE LAW.

"Won't you try the chicken soup, judge?" asked Mrs. Small of her boarder, not noticing that he had gone beyond the soup stage in his dinner. "I have tried it, madam," replied the judge. "The chicken has proved an alibi."—*Truth*.

During the days of duelling in the South of a certain distinguished lawyer, who was a rapid shot and successful duellist, was said by his friends to have "shot into" celebrity. He evidently was also quite a wit, for, being a small man, he was engaged for a duel with a very large man, whereupon he insisted that, to make the match even, the size of his own figure should be chalked on the body of his adversary, and that any shots striking outside the chalked lines should not count.

Counselor J. Quibble: "Law, my boy? Why, this whole universe is an example of the reign of law."

Young Gibby: "Maybe; but there is no fool legislatures assembled every now and then in the realm of nature!"

A Kentucky court in a late case says: "While a man who marries a widow with eight infant children assumes a great responsibility, yet we think the honeymoon at least, should be over before he qualifies as the guardian of the wife's infant children and seeks the aid of a court to seal their home for their maintenance and education."

In an Irish provincial paper is the following notice: "Whereas, Patrick O'Connor lately left his lodgings, this is to give notice that if he does not return immediately and pay for the same he will be advertised."

## WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCIDENT INSURANCE—Voluntary Exposure.—It is voluntary exposure to unnecessary danger, within the prohibition of an accident policy, for one to attempt to cross a railroad track between the cars of a freight train standing on it, when he saw that its crew were in their places, merely on his own assumption that he would have time enough before it was started.—WIL-  
LARD v. MASONIC EQUITABLE ACC. ASSN., Mass., 47 N. E. Rep. 1006.

2. ACCOUNT CURRENT—Evidence—Balance Due.—In an action of contract, on an account annexed, a finding that there was an open and mutual account current is sustained by evidence that a horse which plaintiff had bought from defendant's testator was to be charged to plaintiff's account, that "that was the agreement and understanding," that the price was to be \$20, and that "it was to be applied on the account."—KINGSLEY v. DELANO, Mass., 47 N. E. Rep. 1013.

3. ACTION OF TORT—Venue.—It is a general rule of law that for the purpose of redress it is immaterial where a tort was committed, and, where the wrong is personal, the action is transitory, and may be brought in the jurisdiction where the wrongdoer may be found.—MYERS v. CHICAGO, ST. P., ETC. RY. CO., Minn., 72 N. W. Rep. 694.

4. APPEAL.—Where appellant has availed himself of so much of the decree as was in his favor, he cannot appeal from so much of it as was against him, under Rev. St. 1894, § 644 (Rev. St. 1881, § 632), providing that a party obtaining a judgment shall not take an appeal after receiving any money thereon.—SONNTAG v. KLEE, Ind., 47 N. E. Rep. 962.

5. APPEAL—Necessary Parties.—Where a person is made party defendant, but after the cause is put in issue no account is taken of him as a party, and judgment is rendered only against the other defendant, he is not a necessary party to an appeal.—ANDERSON GLASS CO. v. BRAKEMAN, Ind., 47 N. E. Rep. 937.

6. ASSUMPSIT—Violation of Trust—Money Had and Received.—Action for money had and received is proper remedy where the maker of notes, knowing they are in the hands of a third person, pays the amount thereof to the payee, at his solicitation, and on his representation that he is still the owner thereof, and will in a few days obtain and deliver them to the maker, and the payee fails to pay the notes, and obtain them from the person holding them as security, and refuses to return the money, but converts it to his own use.—GILLESPIE v. EVANS, S. Dak., 72 N. W. Rep. 576.

7. ATTACHMENT—Dissolution.—One made defendant to an attachment proceeding may move to discharge the same from the whole or any part of the property, notwithstanding the fact that he had disposed of his entire interest in such property prior to its seizure.—KOUNTZE v. SCOTT, Neb., 72 N. W. Rep. 555.

8. ATTORNEY AND CLIENT—Compensation.—Although an attorney has made a bargain with his client which is void for champerty, he may recover a reasonable compensation for his services on a quantum meruit.—GAMMONS v. JOHNSON, Minn., 72 N. W. Rep. 563.

9. BANKS AND BANKING—Bills of Lading—Transfer.—Where a consignor transfers to a bank a bill of lading and a draft drawn by him upon the consignee for the price, and the bank gives him credit therefor, the bank acquires title to the goods, as against the consignor's creditor attaching them *in transitu*, though the bank had not advanced any money to the consignor before such attachment.—FIRST NAT. BANK OF KANSAS CITY, Mo., v. MT. PLEASANT MILLING CO., Iowa, 72 N. W. Rep. 689.

10. BENEVOLENT SOCIETY—Mutual Benefit Insurance.—An insurance association whose rules provide that a member shall forfeit his rights on failure to pay an assessment within a special time after notice thereof, subject to reinstatement on payment of arrearages, etc., does not waive the forfeiture by making a new assessment, and sending the member notice thereof, while he is in default for failing to pay the previous one within the time limited.—TOELLE v. CENTRAL VEREIN, Wis., 72 N. W. Rep. 630.

11. BENEVOLENT SOCIETY—Mutual Benefit Societies.—A certificate of membership in a mutual benefit company, which accepts a named person as a member, "subject to all the conditions hereinafter named," and which contains a condition on the back, stating that it is issued under a statute "under which the benefits herein provided for are derived from payments by policy holders as ordered by the board of directors," is not a promise of absolute indemnity in case of death, but merely a promise of indemnity according to the articles of incorporation and the by-laws of the company.—MOORE v. UNION FRATERNAL ACC. ASSN., Iowa, 72 N. W. Rep. 645.

12. BILLS AND NOTES—Payment.—Whether a note, given after maturity of another note, and having included therein the amount of the other, operated as a payment of the first note, is a question of fact depending on the intention of the parties and the circumstances surrounding the transaction.—AGAWAM NAT. BANK v. DOWNING, Mass., 47 N. E. Rep. 1016.

13. BROKER—Right to Compensation.—In an action for the recovery of an agreed compensation to be paid on the making of a sale or disposition of property, a broker is not entitled to recover for merely finding a purchaser, where the sale failed of consummation.—DORRINGTON v. POWELL, Neb., 72 N. W. Rep. 587.

14. CARRIERS OF GOODS—Damages for Delay.—In an action for damages against a carrier for failure to de-

liver the goods shipped with reasonable dispatch, defendant is liable for such damages as are the natural results of its conduct, and which might have been expected to be within the contemplation of the parties as the probable result of a breach of the contract of carriage.—*SWIFT RIVER CO. v. FITCHBURG R. CO.*, Mass., 47 N. E. Rep. 1015.

15. **CARRIERS OF PASSENGERS**—Sleeping Car Companies—Loss of Baggage.—The porter of a sleeping car, half an hour before starting time, and after putting a passenger's traveling bag in the car on a seat opposite the side on which passengers were received, opened the window opposite the seat, without request, in violation of a rule of the company. The passenger was about to sit in the seat when the window was opened, and the porter had no reason to believe that he would leave it, but the passenger did so, and the baggage was stolen: Held a question for the jury whether the opening of the window was negligence.—*DAWLEY v. WAGNER PALACE CAR CO.*, Mass., 47 N. E. Rep. 1024.

16. **CHattel MORTGAGE**—Sale of Mortgaged Property.—Where a chattel mortgage provides that the mortgagee must sell the property in the name of the mortgagee, and that the lien shall follow the property, the mortgagee can recover the price of the buyer under the common counts in *assumpsit*.—*FLOOD v. BUTZBACH*, Mich., 72 N. W. Rep. 603.

17. **CONSTITUTIONAL LAW**—Delegation of Taxing Power.—Under Const. art. 3, § 1, vesting the power of taxation in the legislature without express limitation, the legislature may, for proper purposes, delegate such power to municipalities, but not to municipal officers or boards not elected by the people; and hence Acts 26th Gen. Assem. ch. 50, empowering boards of library trustees (appointed by the mayor and council in cities accepting the provisions of Code 1873, § 461, relating to the establishment of public libraries) to fix a rate of taxation annually, within a specified limit, for the maintenance of a library and a library building, and requiring the council to levy and collect the tax so fixed, is unauthorized and void.—*STATE v. MAYOR, ETC., OF CITY OF DES MOINES*, Iowa, 72 N. W. Rep. 639.

18. **CONSTITUTIONAL LAW**—Indictment—Number of Grand Jury.—Section 13, art. 1, Const., which provides that the offenses formerly prosecuted by indictment shall, under the State government, be prosecuted by information or by indictment found by a grand jury of seven, five of whom must concur therein, is not *ex post facto*, and is not in conflict with the constitution of the United States. Nor is section 10 of the same article *ex post facto* or in conflict with the constitution of the United States.—*STATE v. CARRINGTON*, Utah, 50 Pac. Rep. 526.

19. **CONSTITUTIONAL LAW**—Statutes—Special Acts.—P. L. 1897, p. 43 (providing that in cities of the first class, which comprises all cities having a population exceeding 100,000, and in those cities only, municipal officers shall be elected on the first Tuesday after the first Monday of November, and upon the same official ballots required by law for the election of State and county officers), does not affect the machinery, powers, or structure of city government; and population is not a proper basis for classification for the purpose of the act, and hence the act is repugnant to Const. art. 4, § 7, par. 11 (prohibiting special laws regulating the internal affairs of towns and counties).—*WANSER v. HOOS*, N. J., 38 Atl. Rep. 449.

20. **CONTRACTS**—Consideration—Compounding Felony.—The defense that the consideration of a note and mortgage was illegal, in that the mortgagee promised not to prosecute another for embezzlement, when no prosecution was pending, was not sustained where defendant did not plead and prove that an embezzlement had been committed.—*COLUMBIA LODGE NO. 117, I. O. O. F. v. MANNING*, N. J., 38 Atl. Rep. 444.

21. **CONTRACT**—Construction—Use of Firm Name.—An agreement between members of a firm which would

expire on January 31, 1899, provided that on February 1, 1899, L, one of the partners, should sell his interest to the others, who agreed to make a copartnership to commence on the latter date, for five years, under the old firm name of L, W & Co. On February 1, 1899, the new copartnership was formed, and L, in writing, sold to his former partners, "at this date constituting the firm of L, W & Co., all my right, title, and interest to and in any and all things and property of whatsoever name or nature in which I have an undivided interest with" said former associates "as a member of the late firm," etc.: Held, that the instrument did not carry by implication the right to use the old firm name after the expiration of the five years.—*LAWRENCE v. HULL*, Mass., 47 N. E. Rep. 1001.

22. **CONTRACTS**—Right to Rescind—Waiver.—A contract contained a covenant that plaintiff would pay for goods furnished by defendant within 60 days from their delivery, the goods to be furnished from time to time, and provided that, on breach of the covenant by either party, the other might rescind: Held that, by waiving one breach, defendant did not waive a subsequent breach.—*WILKINSON v. BLOUNT MANUFACTURING CO.*, Mass., 47 N. E. Rep. 1020.

23. **CONTRACTS**—Unlawful Purpose.—A non-resident brewing company made a contract with its agent for the sale of beer in the State in original packages. The agent having sold some beer by the glass, the beer was seized, and the agent, in replevin by the principal to recover the beer, became a surety on the bond, and was compelled, on judgment against the company, to pay the amount of the damages. In an action by the agent to recover the same, defendant demurred, setting up that the contract for the sale of beer was unlawful: Held, that the contract, being for the sale in original packages, was valid, so that any claim that the seizure and replevin of the beer grew out of any unlawful purpose in the original contract was unfounded.—*GREEN v. P. SCHOENHOFFEN BREWING CO.*, Iowa, 72 N. W. Rep. 655.

24. **CONTRACT OF AGENT**—Liability of Principal.—Where the owner of land employs another to cultivate the same, specifying the manner of payment for the work to be done, and providing that the owner is to be at no other expense for labor done on said land, if the owner afterwards directs the employee to do additional work, and to get some one to help him, the owner is liable for the reasonable value of labor done by a third person, hired by the party employed to cultivate the land.—*BARNES v. HOGATE*, Iowa, 72 N. W. Rep. 688.

25. **CORPORATION**—Foreign Corporations.—Where a foreign corporation sells goods within the State, there is no presumption that the sales are interstate commercial transactions so as to render inapplicable Act March 8, 1893, requiring such corporations to do certain acts as a condition precedent to the right to do business in the State.—*KENT & STANLEY CO. v. TUTTLE*, Mont., 50 Pac. Rep. 559.

26. **CORPORATIONS**—Paid-Up Stock—Assessments.—By plaintiff's articles of incorporation, and by indorsement on its certificates of stock, provision was made that the stock should be subject to assessment for the payment of a mortgage on real estate conveyed to the company by its shareholders in exchange for shares, and constituting the capital stock of the corporation, which was expressed as paid in full, though the mortgage was outstanding: Held that, though expressed as paid in full, the stock was not paid for, except in so far as liability to assessment was payment, and the shareholders were bound by the condition making the shares subject to assessment.—*WESTERN IMP. CO. v. DES MOINES NAT. BANK*, Iowa, 72 N. W. Rep. 657.

27. **CORPORATIONS**—Stock—Transfer.—A transfer of shares of stock is invalid as to creditors, even though they have notice, when made in any other way than that provided by Code 1873, § 1078, which declares that a transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the

books of the company. — OTTUMWA SCREEN CO. V. STODGHILL, Iowa, 72 N. W. Rep. 669.

28. CORPORATIONS—Usurpation of Powers—Quo Warranto. — A corporation composed of dealers in plumbers' supplies, incorporated under Pub. St. ch. 115, relating to "associations for charitable, educational and other purposes,"—for the avowed purpose of "promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings,"—usurps privileges not conferred by law when it attempts to enforce collection of an account alleged to be due a member, by notifying the other members of its non-payment, and preventing the alleged debtor from obtaining credit till it is paid. — HARTNETT V. PLUMBERS' SUPPLY ASSN. OF NEW ENGLAND, Mass., 47 N. E. Rep. 1002.

29. COUNTY BRIDGES—Highways Crossed by Stream. — Act June 13, 1886, § 35, providing that when a stream over which it may be necessary to erect a bridge crosses a public road or highway, and the expense of erection is too great for one or two adjoining townships, it may be at the expense of the county, applies only to a case where a highway, in the shape of a ferry or otherwise, has actually existed across the stream, and not where a township street terminates at a river bank, and its extension across the stream has merely been projected. — IN RE BRIDGE BETWEEN BOROUGH OF CONNELLSVILLE AND NEW HAVEN, Penn., 38 Atl. Rep. 478.

30. CREDITORS' BILL — Money in Hands of Clerk of Court. — An action in equity will not lie to subject to the payment of the claims of the creditor money held by the clerk of the court in his official capacity. — ANHEUSER-BUSCH BREWING ASSN. V. HIER, Neb., 72 N. W. Rep. 588.

31. CRIMINAL LAW—Burglary.—The lifting of a hook, with which a door is fastened, or the opening of a closed door in order to enter a building, is a "breaking," within the accepted definition of burglary, although the entry might have been effected through a door already open. — FERGUSON V. STATE, Neb., 72 N. W. Rep. 590.

32. CRIMINAL LAW — Invalidity of Sentence. — In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or extent of the punishment inflicted, renders the judgment void. — IN RE CHRISTIAN, U. S. C. C., W. D. (Ark.), 82 Fed. Rep. 199.

33. CRIMINAL LAW—Larceny—Indictment.—An indictment for larceny need not state the aggregate value of the several articles alleged to have been stolen, where the mention of each specific article is followed by an allegation of its value. — STATE V. KELLNER, Oreg., 50 Pac. Rep. 532.

34. DEEDS — Ambiguities — Easements. — Plaintiff claimed a right of way to the east of his property under an ambiguous deed from defendant's grantor, who then owned the land east of plaintiff. Defendant, on cross-examination of plaintiff, asked him whether his grantor declined furnishing fence posts for the east line, after executing the deed to plaintiff, without in terms excluding a conversation: Held, not error to permit plaintiff, on redirect examination, to give the entire conversation with his grantor relative to his declining to furnish fence posts, giving his reasons therefor. — QUIGLEY V. BAKER, Mass., 47 N. E. Rep. 1007.

35. DEED — Cancellation — Fraudulent Purpose. — Where a husband voluntarily conveys property to his wife in anticipation of a suit or suits against him as the result of a conspiracy to injure him and extort money, and she knows nothing of the conspiracy except what he tells her, equity will not aid him to obtain a reconveyance. — POPPE V. POPPE, Mich., 72 N. W. Rep. 612.

36. DEED — Estate in Expectancy. — An estate in expectancy is not the subject of grant. — IN RE LENNIG'S ESTATE, Penn., 38 Atl. Rep. 466.

37. DEEDS—Reservation — Reformation.—One of two tenants in common conveyed his undivided one-half interest to the other, reserving the timber then on the land. It was understood by both that all of the timber was to become the property of the grantor, but the effect of the deed was to reserve but one-half: Held, that the deed would be reformed to give effect to the common understanding. — SMITH V. WAKEMAN, Mich., 72 N. W. Rep. 599.

38. DEPOSITION — Change in Title of Case. — It is no ground for exclusion of deposition that after it was taken for plaintiff, and returned in envelope bearing title of the cause, as prescribed by Comp. Laws, § 5292, other persons were, by amendment, made plaintiffs; the issues not being materially changed or defendant prejudiced thereby. — SALMER V. LATHROP, S. Dak., 72 N. W. Rep. 570.

39. DIVORCE — Alimony. — Gen. St. 1894, § 4799, which provides that "in every action brought either for a divorce or separation" alimony *pendente lite* may, in the discretion of the court, be awarded to the wife, must be construed as requiring the court to exercise a sound judicial discretion. While the fact that a wife has separate property of her own in a circumstance to be considered in determining her application for temporary alimony, it is not necessarily controlling. — STIEHM V. STIEHM, Minn., 72 N. W. Rep. 708.

40. ELECTIONS — Ballots — Making Cross.—Pub. Acts 1893, No. 202, § 26, provides that, if an elector wishes to vote for a candidate not on any ticket, he must write or paste the name of such candidate on his ballot, opposite the name of the office, and make a cross in the circle under the party name, and, if no cross is placed in such circle, a cross in the square before any candidate's name shall be deemed a vote for such candidate, except where the elector votes for more candidates for the same office than are to be elected: Held, that the pasting of respondent's name over the name of relator, without putting a cross under any party name or opposite the name of respondent, or erasing the name of a third candidate on the ballot, was not a compliance with the law. — PEOPLE V. FOX, Mich., 73 N. W. Rep. 611.

41. ESTOPPEL—Laches.—A guardian of an insane person sold his land by order of the court, but for an inadequate price, to a third person, for his own benefit, and on the subsequent death of the ward accounted for the price to his administrator: Held, not to estop the heirs of the insane ward from setting aside the sale as fraudulent. — HEYL V. GOELZ, Wis., 72 N. W. Rep. 626.

42. EXECUTION — Confirmation of Sale.—Where the judgment defendant paid to the clerk of the district court the entire amount necessary to satisfy a judgment which had been rendered by such court, and such payment was so received by said clerk, by whom, however, no discharge of judgment was entered, held that, upon the sheriff's sale subsequently made to the judgment plaintiff by virtue of said judgment as though unpaid, confirmation was properly refused. — MOORE V. BOYER, Neb., 72 N. W. Rep. 556.

43. FIXTURES — What Constitute—Equity.—A tenant, having no contract with or consent from the landlord, constructed a back building, and permanently attached the same to the rear end of a house on the demised premises, in such manner that its removal will leave the original structure without any inclosure at the rear end. The original building and the added structure have, since the latter was built, been used together for a hardware store, neither being usable for that purpose without the other. At the time the back building was constructed, the tenant had no formed intention either to make a permanent addition to the premises, or to remove the structure: Held, the back building has become part of the freehold. — FORTESCUE V. BOWLER, N. J., 38 Atl. Rep. 445.

44. **FRAUDS, STATUTE OF**—Letters of Credit.—Recovery may be had for the price of goods sold on credit through defendant's fraud in subscribing his name as a witness to a false signature to a letter of credit, as such action is not founded on an oral representation as to the solvency of another, within Rev. St. 1894, § 6634 (Rev. St. 1891, § 4909), providing that one cannot be charged for a representation as to the credit of another unless such representation be in writing, and signed by him.—*MENDENHALL V. STEWART, Ind.*, 47 N. E. Rep. 943.

45. **FRAUDS, STATUTE OF**—Sale of Lands.—No such equity is established as to take a parol sale of land by a father to his children out of the statute of frauds, where the evidence fails to show a change of possession of management of the property in pursuance of the contract, or part performance of it by them which cannot be compensated in damages.—*DEER V. JACKERMAN, Penn.*, 38 Atl. Rep. 475.

46. **FRAUDULENT CONVEYANCE**—Action to Set Aside—Judgment.—In an action against a husband and wife by a judgment creditor of the husband to set aside a conveyance of land to the wife, and have the property sold to satisfy plaintiff's judgment, relief will not be denied from the mere fact that the homestead right and liens prior to the judgment may absorb all the proceeds of sale.—*PETERSON V. GITTINS, Iowa*, 72 N. W. Rep. 662.

47. **GUARDIAN AND WARD**—Discharge—Bondsmen.—The fact that a guardian's bondsman, as such, was permitted to perfect an appeal in the name of the guardian from an order fixing the guardian's liability to the estate of two wards, does not estop the bondsman, when afterwards sued on the bond, from pleading the statute of limitations against one of the wards, particularly where he admits liability to the other ward.—*PERKINS V. CHENEY, Mich.*, 72 N. W. Rep. 595.

48. **GUARDIAN**—Void Appointment—Liability of Surety.—The fact that an order appointing one as guardian proved to be void for want of jurisdiction, does not relieve his bondsman from liability, where the supposed guardian, as such, received funds, for which he failed to account.—*HAZELTON V. DOUGLAS, Wis.*, 72 N. W. Rep. 637.

49. **HABEAS CORPUS**—Evidence.—The writ of *habeas corpus* deals only with defects of a jurisdictional character, and, where the relator is held by virtue of process issued upon a final judgment of a court of competent jurisdiction, the evidence introduced on his trial cannot be reviewed by the court or officer issuing the writ, for the purpose of determining its sufficiency to support his conviction.—*LACY V. NORBY, Minn.*, 72 N. W. Rep. 703.

50. **HOMESTEAD**—To What Debts Subject.—A homestead is not subject to the debts of the deceased owner, unless they were contracted prior to the acquisition of the homestead.—*IN RE GARDNER'S ESTATE, Iowa*, 72 N. W. Rep. 652.

51. **HUSBAND AND WIFE**—Separate Estate of Wife.—In a contest between a wife and her husband's creditors for farm produce, which, together with the farm on which it was grown, was in the apparent possession of the husband her claim to the crop being rested on title to the farm, she has the burden of showing the existence of an estate in her, not derived from her husband, and a *bona fide* purchase by herself of the farm with such separate estate; and the mere showing of a deed to her is not enough.—*EATENSON V. POWNALL, Penn.*, 38 Atl. Rep. 471.

52. **INFANTS**—Appointment of Attorney—Ratification.—The appointment by a minor of an attorney to sell and convey real estate, and a conveyance by the attorney under such appointment, are not void, but merely voidable, and capable of ratification by the infant on attaining his majority.—*COURSOLLE V. WEYERHAUSER, Minn.*, 72 N. W. Rep. 697.

53. **INJUNCTION BOND**—Sufficiency of Petition.—Where, in an action on an injunction bond, plaintiff's amended petition shows that no action wherein said

injunction bond purports to have been given had been commenced at the time of the execution of same, and that neither of the two necessary steps in the commencement of an action had been taken at said time, and was never taken subsequently thereto, and, even conceding that the petition shows the first of the two necessary steps in the commencement of an action to have been performed, said petition fails to show any final disposition of the entire cause or proceeding wherein such bond was given, it is not error for the trial court to sustain a general demurrer to said petition.—*REDDICK V. WEBB, Okla.*, 50 Pac. Rep. 363.

54. **INJUNCTION**—Rivals in Business—Advertising.—Where it appeared that, after the purchase of a stock of goods of a certain bankrupt firm by plaintiff, defendant, who was engaged in the same business in the same city, advertised that he had purchased goods which had been manufactured for such bankrupt firm, which fact there was testimony to support, and it also appeared that plaintiff had, in its advertisements, grossly misrepresented the value of the stock so purchased by it, the facts were insufficient to justify interference by injunction to restrain defendant from so advertising, on the alleged ground that the public would be misled and deceived thereby.—*SCHRADESKY V. APPEL CLOTHING CO., Colo.*, 50 Pac. Rep. 528.

55. **INSURANCE COMPANIES**—Where may be Sued.—Under McClain's Code, § 3789, providing that "insurance companies may be sued in any county in which is kept their principal place of business, in which was made the contract of insurance, or in which the loss insured against occurred," a suit against such company was properly brought in the county in which the loss occurred, where the recovery for such loss was the ultimate relief sought, though, as an incident thereto, other relief was also taken.—*BENESH V. MILL OWNERS' MUT. FIRE INS. CO. OF IOWA, Iowa*, 72 N. W. Rep. 674.

57. **INSURANCE**—Conditions—Limitation of Actions.—An action on a policy providing that no suit on it should lie, unless commenced within 6 months after the fire, was defeated because it was commenced within 90 days after notice of loss, contrary to Acts 18th Gen. Assem. ch. 21, § 3: Held, that plaintiff was not entitled to maintain a second action, not commenced within 6 months after the fire, because defendant did not set up the defense of prematurity in the first action until the 6-months limitation had expired.—*WILHELM V. DES MOINES INS. CO., Iowa*, 72 N. W. Rep. 685.

57. **INSURANCE**—Limitation of Actions.—A policy of insurance provided that no action thereon should be maintained unless commenced within six months after the fire: Held, that the limitation did not begin to run until 60 days after notice and proof of loss were furnished the company, which was the time of payment fixed by the policy.—*READ V. STATE INS. CO., Iowa*, 72 N. W. Rep. 665.

58. **JUDGMENT**—Confession—Authority of Agent.—Authority to an agent to collect a certificate of deposit when due vests the agent with authority to procure a confession of judgment for his principal.—*BRIGGS V. YETZER, Iowa*, 72 N. W. Rep. 647.

59. **JUDGMENT**—Entry—Authority of Clerk.—Where a cause is heard by a court or referee, the judgment entered by the clerk of the court must be in accordance with the conclusions of law and the order for judgment. He has no authority to include anything in the judgment which is not authorized by such conclusions and order, even although the findings of fact would have justified or required different conclusions of law.—*RAMALEY V. RAMALEY, Minn.*, 72 N. W. Rep. 694.

60. **JUDGMENT**—Lien—Priority.—A term of a district court began on the 20th of November, during which a judgment was rendered, not by confession, in an action commenced prior to the beginning of the term. During said term, but before the rendition of the judgment, the judgment debtor mortgaged his real estate: Held: (1) That the lien of the judgment attached

against the real estate of the judgment debtor on the 20th of November; (2) that the lien of the judgment was prior to the lien of the mortgage, though the latter was filed for record prior to the date of the rendition of the judgment. — *OCOBOCK V. BAKER*, Neb., 72 N. W. Rep. 582.

61. **JUSTICE OF THE PEACE** — Unlawful Attachment. — A justice of the peace who issues an order of attachment against a resident of the State without an undertaking therefor first having been executed is liable for nominal damages to the defendant in such attachment, although the latter suffers no actual injury therefrom. — *HEAD V. LEVY*, Neb., 72 N. W. Rep. 583.

62. **LIFE INSURANCE** — Dissolution of Insurance Company. — When an action is instituted for the dissolution of a life insurance company, and a judgment of dissolution is entered therein, such judgment relates back to the commencement of the action, fixing the rights of all parties as of that day; and the claim of a policy holder is to be adjusted according to his rights and interests in the assets of the corporation on that day, without regard to the fact of the death of the assured after the dissolution of the corporation, but before the filing of proofs of claim. — *PEOPLE V. COMMERCIAL ALLIANCE LIFE INS. CO.*, N. Y., 47 N. E. Rep. 968.

63. **LIMITATIONS** — Concealing Cause of Action. — To bring a case within Rev. St. 1894, § 301 (Rev. St. 1891, § 300), providing that, if any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitations after the discovery of the cause of action, there must have been some artifice to prevent discovery, or some material fact misstated to or concealed from the party by the means of some positive act or declaration when information was being sought. — *JACKSON V. JACKSON*, Ind., 47 N. E. Rep. 968.

64. **MARRIED WOMEN** — Securing Husband's Debts. — Plaintiff indorsed the note of defendant's husband to secure a loan for carrying on his business, and received defendant's note and a chattel mortgage on her piano as security for such indorsement. Subsequently defendant gave plaintiff a note for the amount of the note on which the loan had been secured, and the chattel mortgage and note held by plaintiff were canceled: Held that, by mortgaging her own property to secure the debt of her husband, defendant became liable for his debt, and her note to plaintiff was supported by a sufficient consideration. — *MARX V. BELLER*, Mich., 72 N. W. Rep. 620.

65. **MASTER AND SERVANT** — Complaint. — In an action for the death of a locomotive engineer caused by derailment of his engine, the complaint, which charged careless failure to provide a safe road-bed and a safe engine, and carelessly permitting the fills and embankments thereon to be and remain too narrow, and permitting the road to become and remain out of repair, sufficiently charged negligence based on the condition of a cut where the accident occurred. — *WALKER V. MCNEILL*, Wash., 60 Pac. Rep. 518.

66. **MECHANIC'S LIEN** — Statement of Claim. — If in the statement filed the property to be affected is described as a lot in a designated block, and the evidence discloses that the major portion of the material was furnished and labor performed on a part of the building erected which stands on a piece or strip of land adjoining said lot, which is not a part of the lot, the lien cannot be enforced against the lot described for the material furnished or work done, not used on the part of the building which stands thereon. — *WESTERN CORNICE MANUFACTURING CO. V. LEAVENWORTH*, Neb., 72 N. W. Rep. 592.

67. **MECHANIC'S LIEN** — Contract — Subcontractor. — A building contract provided that the contractor should "not let, assign, or transfer the contract, or any interest therein, without the written consent of the architect." The contractor, without such consent, employed petitioner to perform a portion to the work. Pub. St. ch. 191, § 1, gives a lien to one who performs labor or furnishes materials for a building by consent

of the owner, or of any person acting for such owner: Held, that petitioner was entitled to a lien, the consent of the owner to his employment (implied from the nature of the principal contract) being unaffected by the provision quoted. — *PERRY V. POTASHINSKI*, Mass., 47 N. E. Rep. 1022.

68. **MORTGAGE FORECLOSURE** — Lien. — Where a mortgage is given upon a single tract of land, to secure a debt due and payable as an entirety, and upon default in payment a foreclosure is had, under the power contained in the mortgage, a sale for less than the amount due exhausts the lien of the mortgage. — *LOOMIS V. CLAMBET*, Minn., 72 N. W. Rep. 707.

69. **MORTGAGES** — Priority — Fraudulent Conveyances. — Where one accepts a mortgage subject to a first mortgage, he cannot have his mortgage declared a first lien by assailing the first mortgage for fraud, which he discovered after accepting his mortgage, as fraud does not furnish the means of enlarging the terms of a contract. — *OLD NAT. BANK OF EVANSVILLE V. HECKMAN*, Ind., 47 N. E. Rep. 958.

70. **MORTGAGES** — Want of Seal — Reformation. — Where an instrument which requires a seal is, by accident or mistake, executed without one, a court of equity may compel a seal to be affixed, or otherwise grant relief. — *GAYLORD V. PELLAND*, Mass., 47 N. E. Rep. 1019.

71. **MUNICIPAL CORPORATIONS** — Improvements — Assessment of Benefits. — P. L. 1896, p. 149 (8 Gen. St. p. 8370), providing that commissioners shall, when any assessment of benefits for a public improvement levied prior to the enactment of said law remains unpaid, examine into and determine how much of such assessment, if any, shall be laid and collected, does not authorize said commissioners to set off, against the assessment as levied, awards for portions of the same land, previously taken by the city. — *VAN BUSKIRK V. MAYOR, ETC., OF CITY OF BATONNE*, N. J., 38 Atl. Rep. 464.

72. **MUNICIPAL CORPORATIONS** — Improvement. — St. 1884, ch. 226, authorized the authorities empowered to lay out a public improvement, whenever they should take any land therefor, to make an agreement in writing with the owner that the city or town should assume any betterments assessed on the remainder of his land, or any portion thereof, if he should in turn release, on such terms as might be agreed with them, all claims for damages: Held, that such agreements with landowners did not invalidate the assessment of a betterment tax, where the city received a full equivalent for the assumption of the betterment assessments. — *TOWNE V. CITY COUNCIL OF CITY OF NEWTON*, Mass., 47 N. E. Rep. 1029.

73. **PARTNERSHIP** — Sharing Profits. — The fact that compensation for services is to be contingent on, and paid from, the profits of the business, does not of itself make the employee a partner. — *RYDER V. JACOBS*, Penn., 38 Atl. Rep. 471.

74. **PLEADING** — Amendment — Conversion. — Where the fact that funds alleged to have been converted were received as trustee or agent is not pleaded, evidence thereof cannot be considered, there being no amendment, in view of Code, § 273, providing for amendments by the insertion of allegations material to the case. — *PARKER V. HARDEN*, N. Car., 28 S. E. Rep. 20.

75. **PLEADING** — Amendment — New Cause of Action. — After the statutory period of limitation had elapsed from the time of an injury, plaintiff filed an amended petition, charging defendant with negligence in retaining an employee who did the act which the original petition alleged was defendant's negligence: Held, the amended petition did not set up a new cause of action. — *SHERMAN OIL & COTTON CO. V. STEWART*, Tex., 42 S. W. Rep. 241.

76. **PLEDGES** — Parol Evidence. — The mere fact that an assignment of a land contract by the purchaser was absolute in form did not preclude parol evidence that the transaction was merely a pledge. — *GETTELMAN V. COMMERCIAL UNION ASSUR. CO.*, Wis., 72 N. W. Rep. 627.

**77. PRINCIPAL AND AGENT—Agent Acting as Principal.**—One who, in his individual name, contracted to purchase property, and gave a mortgage thereon to secure the price thereof, is personally liable for any deficiency after foreclosure of such mortgage, though the seller knew that others were interested, or that the purchaser was acting with the intention of conveying the property to others.—*LEWIS v. WEIDENFELD*, Mich., 72 N. W. Rep. 604.

**78. PRINCIPAL AND AGENT—Authority of Agent.**—Where an agent to negotiate a sale of lots has no authority to make a contract without the owner's consent, a parol license given a purchaser to use adjoining land as a private way, of which the owner has no knowledge, is not binding on the owner.—*NOTTSGER v. BARKDALL*, Ind., 47 N. E. Rep. 960.

**79. PRINCIPAL AND AGENT—Factor—Right to Receive Purchase Price.**—A factor who is entrusted with the possession of property, or other indicia of authority to transfer it, has implied power to receive the purchase price for the vendor at the time that he sells and delivers the property, or the title deeds to it.—*ADAMS v. FRASER*, U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 211.

**80. PRINCIPAL AND AGENT—Ratification of Unauthorized Act.**—One is not permitted to ratify an unauthorized act in so far as it operates to one's advantage, and repudiate it in so far as it imposes burdens. If one avails oneself of the fruits of an act, one thereby charges himself with the burden of all the instrumentalities employed by the agent to effect his purpose.—*D. M. OSBORN & Co. v. JORDAN*, Neb., 72 N. W. Rep. 479.

**81. PRINCIPAL AND SURETY—Subrogation of Surety.**—A surety, whose property, under an execution against his principal and himself, has been levied upon and sold in satisfaction of the sum due the judgment creditor, "pays off and discharges" the debt of his principal, within the meaning of section 2167 of the Code; and when that fact has been entered upon such execution by the officer charged with its collection, such surety is entitled to control the same for the purpose of enforcement against the principal debtor.—*EZARD v. BELL*, Ga., 28 S. E. Rep. 28.

**82. PROCESS—Service by Publication—Idem Sonans.**—Where service, in an action for divorce against a non-resident, is by publication, and defendant makes default, and does not appear, the court cannot assume that the name "Keesel" in the published summons should be understood as "Keisel," defendant's real name, on the principle of *idem sonans*; and a decree based on such a service is void, and is subject to collateral attack.—*HUBNER v. REICKHOFF*, Iowa, 72 N. W. Rep. 540.

**83. PROCESS—Service on Domestic Corporation.**—Under Rev. Stat. 1894, § 318 (Rev. Stat. 1891, § 316), providing that process against a domestic corporation may be served upon a general or special agent where its officers are not found; and Civ. Code 1852, § 796 (2 Rev. Stat. 1876, p. 313), providing that any action against a corporation may be brought in any county where it has an office for the transaction of business—service on a local agent is good against a domestic insurance company having its home office in another county, though the action did not grow out of and was not connected with the business of the office where the suit was brought.—*GLOBE ACC. INS. CO. v. REID*, Ind., 47 N. E. Rep. 947.

**84. PUBLIC LAND—Surveys—Mistake.**—Before the courts will correct original United States surveys that have been upheld by the land department, and overthrow the credit due them as established by field notes a mistake must be shown by clear and convincing testimony.—*BLAIR v. BROWN*, Wash., 50 Pac. Rep. 483.

**85. RAILROAD COMMISSION—Discrimination—Reduction of Rates.**—The question whether the rates for transportation fixed by the State railroad and warehouse commission are unreasonable and confiscatory is not determined by the fact that the income under the rates as so fixed will not pay the amount of the

fixed charges of the railroad. Neither can the amount at which the railroad sold years ago on mortgage foreclosure sale be taken as the basis on which to determine what are reasonable rates, but that question is determined by ascertaining what, under all the circumstances, is a reasonable income on the cost of reproducing the road at the present time.—*STEINERSON v. GREAT NORTHERN RY. CO.*, Minn., 72 N. W. Rep. 713.

**86. RAILROAD COMPANY—Accident at Crossing—Contributory Negligence.**—A deaf man who drives upon a railroad crossing, where the view is unobstructed, when a freight train is approaching at a high rate of speed, in plain sight, and so close that it cannot be stopped in time to prevent a collision, cannot recover for injuries sustained thereby.—*CHICAGO, R. I. & P. RY. CO. v. POUNDS*, U. S. C. C. of App., Eighth Circuit, 82 Fed. Rep. 217.

**87. RAILROAD COMPANY—Accidents at Crossings—Contributory Negligence.**—In an action against a railroad company for the death of a blind man, who was being driven by his son, in the daytime, on the main business street of a town, and was killed at a railroad crossing, the question of contributory negligence was for the jury.—*TILTON v. BOSTON & A. R. CO.*, Mass., 47 N. E. Rep. 968.

**88. RAILROAD COMPANY—Eminent Domain—Riparian Rights.**—A railroad company owning riparian lands, or holding them by lease, and diverting water for the purpose of supplying its locomotives, does not thereby exercise its right of eminent domain, and consequently its right to the water is the same as that of any other riparian owner. Therefore, regardless of the needs of its business, it cannot enjoin the taking of the water by a water company duly proceeding under the power of eminent domain.—*PHILADELPHIA & R. CO. v. POTTSVILLE WATER CO.*, Penn., 38 Atl. Rep. 405.

**89. RAILROAD COMPANY—Fires—Harmless Error.**—In an action for damages caused by fire, though it was improper to instruct the jury generally as to the law of negligence as applicable to the case where a special verdict was ordered to be returned, the error was harmless.—*LAKE ERIE & W. R. CO. v. GOULD*, Ind., 47 N. E. Rep. 941.

**90. RAILROAD COMPANIES—Injury to Person on Track.**—The fact that a railway company lays its tracks in a public street, with the space between the main rail and a guard rail wider than is usual or necessary, and without properly filling below the balls of the rails, will warrant a jury in finding negligence in an action by one whose foot was crushed by approaching cars before he could extricate it from between the main rail and the guard rail, where it was caught while he was walking along the street.—*GOODRICH v. BURLINGTON, C. R. & N. RY. CO.*, Iowa, 72 N. W. Rep. 633.

**91. RAILROAD COMPANY—Liens for Labor.**—Comp. Laws, § 5471, gives a lien to one who performs labor in the construction of a railroad under a contract with the owner, contractor, or subcontractor, and provides that such person may file with the clerk in the county where the property is situated, within 60 days after the last day of the month in which such labor was performed, a lien which shall be binding on the erection, excavation, embankment, bridges, road-bed, or right of way, and on the land, etc., "in the county or judicial subdivision in which the same is filed. In case the lien is sought to be enforced against the owner, the liability shall not be greater than his liability would have been to the contractor at the time the labor was performed," etc.: Held, that the liability of the owner for labor performed under a contract with a contractor or subcontractor is limited to the amount due from the owner to such contractor or subcontractor under the contract or subcontract at the time the services were performed.—*ADAMS v. GRAND ISLAND & W. C. R. CO.*, S. Dak., 72 N. W. Rep. 577.

**92. RAILROAD COMPANY—Negligence.**—Whether defendant's engineer, who saw plaintiff at work with a horse on the highway close to the track, was negligent

in giving a signal with the whistle, whereby the horse became frightened, and injured plaintiff, was a question for the jury, though the signal was one established by defendant for the operation of its road, and was in itself proper and reasonable.—*FLYNN V. BOSTON & A. R. CO.*, Mass., 47 N. E. Rep. 1012.

93. RAILROAD COMPANY—Railroads—Negligence—Extraordinary Flood.—A railroad company is liable for injury to the adjoining property of one whose land it had appropriated, caused by the construction of an embankment and bridge insufficient to vent the water of a stream during an ordinary flood.—*BROWN V. PINE CREEK RY. CO.*, Penn., 38 Atl. Rep. 401.

94. RAILROADS—Killing Stock—Gates at Farm Crossings.—Where the gate in a right of way fence at a farm crossing, which was an ordinary gate, sliding between two posts at each end, and to open which it was necessary to shove it back on a line with the fence, and then carry it round, appeared to have been opened by pushing it back and towards the railroad track, permitting the escape of horses to the right of way, no want of ordinary care in the construction or maintenance of such gate was shown, in the absence of evidence that it was defectively constructed, or out of repair or required some other mode of fastening.—*MEARS V. CHICAGO & N. W. RY. CO.*, Iowa, 72 N. W. Rep. 509.

95. REAL-ESTATE AGENT—Right to Commissions.—In an action by a real-estate broker for commissions, it appeared that plaintiff obtained for defendant's property, valued at \$30,000, an offer consisting of an equity in certain apartment houses, estimated at \$30,000, and an equity in certain dwelling houses, estimated at \$30,000, which offer was declined; that plaintiff thereafter obtained from the same person an offer of the apartment houses, and a mortgage for \$30,000 on the property to be taken from defendant, which was also declined; and that another broker, in ignorance of what plaintiff had done, subsequently obtained from the same person an offer of an equity in the apartment houses, estimated at \$15,000, and mortgages for \$35,000 on the property taken of defendant, which defendant accepted: Held, that the offer so accepted was substantially different from either of those submitted by plaintiff, and therefore an instruction on the theory that they were substantially the same was misleading.—*CROWNSHIELD V. FOSTER*, Mass., 47 N. E. Rep. 879.

96. RECEIVER—Leave to Sue.—Act Cong. Aug. 18, 1898 (25 Stat. 496) § 3, providing that every receiver appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with the property in custody, without previous leave of the appointing court, does not grant power to sue in all cases without limitation; and a complaint which states that a railroad company and its receiver, appointed by a United States court, wrongfully claim an interest in land is not sufficient to bring the action under the provision of such act, no act or transaction of the receiver being involved.—*BENNETT V. NORTHERN PAC. R. CO.*, Wash., 50 Pac. Rep. 496.

97. RELIGIOUS SOCIETY—Injunction.—Injunction is the proper remedy for officers of a church entitled to management of its property to restrain interference therewith by members of the parish.—*RICHTER V. KABAT*, Mich., 72 N. W. Rep. 600.

98. SALES—Warranty.—Where a machine is sold under a warranty that it will, when properly operated, perform specified work in a given time, and after a reasonable test the buyer proposes a settlement, including the consideration for the machine, freight, damages for delay, etc., requiring certain concessions from the seller, and the proposition is accepted, the settlement is conclusive, in the absence of any fraud or concealment.—*DAVIS & EGAN MACHINE TOOL CO. V. SOUVENIR WHEEL CO.*, Mich., 72 N. W. Rep. 616.

99. SCHOOL FUNDS—Apportionment—Disposition of Surplus.—Under Rev. St. 1894, § 5968, amending School Laws, § 114 (Rev. St. 1881, § 4462), providing that any school corporation, not expending all the tuition

revenue apportioned to it by the State, shall return the surplus, "if in excess of \$100, to the county treasurer, to be included in the county auditor's report, for distribution at the next apportionment, an alternative writ, setting out the unexpended balance of tuition revenue in excess of \$100, apportioned by the State to the school corporation for a certain year, and alleging that said balance remains in the hands of the school board treasurer, and that, though required by law and requested to pay the same to the county treasurer, he refuses to do so, is sufficiently specific.—*PFAU V. STATE*, Ind., 47 N. E. Rep. 928.

100. SLANDER—What Constitutes.—When considering the sufficiency of the allegations in complaints, a distinction has long been recognized between actions for libel and for slander. Words, when committed to writing, and published, are considered as libelous, which, if only spoken, would not subject the person speaking to any action.—*RICHMOND V. POST*, Minn., 72 N. W. Rep. 704.

101. SPECIFIC PERFORMANCE—Consideration—Covenant to Reconvey.—In an action to enforce the reconveyance of certain lands because the grantees has failed to support the grantor, as required by the conditions of the conveyance, and in default of which he was to reconvey, the grantor is entitled to a specific performance of the covenant for reconveyance.—*STAMPER V. STAMPER*, N. Car., 28 S. E. Rep. 20.

102. STATUTES—Repeal—Intention of Legislature.—A legislature will not be held to have repealed an act by the use of words of absolute repeal where it is apparent that it did not intend to do so.—*HOWLETT V. CHEETHAM*, Wash., 50 Pac. Rep. 522.

103. TAXATION—Franchise Tax—Assessments.—For the purpose of assessing the franchise tax upon a corporation under Laws 1890, ch. 542, as amended prior to 1896, the actual value of its capital stock is to be ascertained by taking the value of its assets, deducting its liabilities and exemptions, and adding the value of the good will of its business, including its right to conduct the same under its franchise.—*PEOPLE V. ROBERTS*, N. Y., 47 N. E. Rep. 980.

104. TAXATION—Transfer Tax—Appraisal of Remainder.—Under the transfer tax law, as amended in 1892, the value of a remainder, dependent upon a life estate, terminable by the marriage of the life tenant, not being ascertainable before the termination of the life estate, is to be appraised when that event occurs, and is then to be ascertained, as of the time of the transfer, by deducting from the value of the whole estate transferred the value of the life estate, as shown by its actual duration.—*IN RE SLOANE'S ESTATE*, N. Y., 47 N. E. Rep. 978.

105. TAX SALES—Suit by State to Enforce Tax Lien.—The attorney employed, pursuant to Rev. St. Mo. 1889, § 7681, to prosecute a suit by the State to enforce its lien for delinquent taxes, is the proper person to make the affidavit prerequisite to an order for publication of notice to unknown owners.—*BRICKELL V. FARRELL*, U. S. C. C., E. D. (Mo.), E. D., 82 Fed. Rep. 220.

106. TEACHERS—Dismissal.—Action of school trustees in dismissing a teacher without a hearing is waived by his appearing, and asking for and being granted a hearing on the charge made against him, resulting in his being found guilty.—*KELLISON V. SCHOOL DIST. NO. 1, CASCADE COUNTY, MONT.*, 50 Pac. Rep. 421.

107. TELEGRAPH COMPANY—Unrepeated Telegrams.—A contract stipulating that a telegraph company shall not be liable for delays in the transmission of an unrepeated message, does not free such company from liability for a delay in the delivery of a message, not caused by mistakes in the tenor of the message.—*BARNES V. WESTERN UNION TEL. CO.*, Nev., 50 Pac. Rep. 488.

108. TOWNS—Release of Debt.—A town cannot, by way of mere gift, release an admitted debt, against the dissent of a minority.—*WELLS V. PUTNAM*, Mass., 47 N. E. Rep. 1006.

109. **TRESPASS — Torts — Ratification.**—Where bailors of cattle are authorized, by the agreement under which the bailee received them, to take possession of and sell them whenever they think best, and they afterwards take the cattle without the bailee's consent, and without compensating him for care and feed, as they had engaged to do, his remedy is an action on the agreement for the breach of it, and he can recover nothing in an action of trespass.—*SCHAEFFNER V. SENENIG*, Penn., 38 Atl. Rep. 473.

110. **TRIAL — New Trial — Misconduct of Counsel.**—Where the record indicates a premeditated design on the part of counsel, in referring repeatedly to matters outside the case, to disregard the rulings and admonitions of the trial court, and also the decision of the supreme court rendered in the same cause on a former appeal, the judgment will be reversed.—*LINDSAY V. PATTIGREW*, S. Dak., 72 N. W. Rep. 574.

111. **USURY — What Constitutes.**—Notes given a wife for money borrowed are usurious where her husband acted as her agent in loaning the money, and it was understood by them that he should invest it on such terms, as to interest and otherwise, as he saw fit, and he added to the amounts of the notes, in excess of the sums actually loaned, certain amounts as his commissions, which, with the rate of interest stipulated in the notes, made the interest exceed the lawful rate, and all such charges were ratified by her.—*MCNEELY V. FORD*, Iowa, 72 N. W. Rep. 672.

112. **VENDOR AND PURCHASER—Contract.**—A vendor's acceptance of payments on the price, long after the contract was made, and with full knowledge of all the facts, estops him from urging fraud on the vendee's part in procuring the contract.—*MCWHIRTER V. CRAWFORD*, Iowa, 72 N. W. Rep. 505.

113. **VENDOR AND PURCHASER — Land Contract — Forfeiture.**—The vendee in a land contract, who has voluntarily forfeited his rights thereunder by default in payments, cannot recover amounts already paid thereon.—*SATTERLEE V. CRONKHITE*, Mich., 72 N. W. Rep. 616.

114. **VENDORS' LIENS—Assignment.**—Where the payee of a note executed a bond for a deed to the payor, agreeing to execute a deed upon payment of the note, an assignee of the note acquired a lien on the land.—*NATIONAL BANK OF COMMERCE OF SEATTLE V. LOCK*, Wash., 50 Pac. Rep. 478.

115. **WATER COURSES — Subsurface Currents — Diversion.**—Subsurface currents or percolations that do not follow definite and known channels are not governed by the rules respecting the use and diversion of water courses.—*CASE V. HOFFMAN*, Wis., 72 N. W. Rep. 616.

116. **WATER COURSES — Obstructions—Liability.**—Defendant constructed a grating across a water course, the water of which was filled with rubbish, which accumulated on the grating, and prevented the flow, setting the water back on plaintiff's land: Held that, if the grating might have been expected to prevent the flow under such condition, and if such condition was likely to arise, and could have been provided for, it was no defense that the condition arose by the negligence of third persons in throwing rubbish into the water.—*BABBITT V. SAFETY FUND NAT. BANK*, Mass., 47 N. E. Rep. 1018.

117. **WATER COURSE — Pollution by Mine Owner.**—A non-riparian mine owner may not artificially cause the injurious discoloration of a natural water course by water from his mine, if, by the use of practicable means within his knowledge, he may carry on his mining operations without injury to the rights of others.—*STERLING IRON & ZINC CO. V. SPARKS MANUFACTG. CO.*, N. J., 38 Atl. Rep. 426.

118. **WILLS—Advancement — Extinguishment.**—A deviser made an advancement to plaintiff, a lawful heir, and then devised his remaining land to a son, on condition that, if he should die before he was 21 years old, the estate should descend as though no will had been made. Said son died 1 year after the deviser had died,

and before he was 21: Held that, on distribution between plaintiff and another heir of the deviser, plaintiff should be charged with the value of the advancement, for the rule that a will extinguishes prior advancements does not apply where the testator intended, under such conditions, that the rights of his heirs should be the same as if he had survived said son, and died intestate.—*TRAMMEL V. TRAMMEL, IND.*, 47 N. E. Rep. 925.

119. **WILLS—Construction—Power of Disposal.**—A devise to testator's wife for life, "with full power to use and dispose of the same as she shall deem right and proper," does not give her a power of disposal by will.—*FORD V. TICKNOR*, Mass., 47 N. E. Rep. 877.

120. **WILLS — Devise in Lieu of Dower.**—Where the widow proposed the will of her deceased husband for probate, and, being nominated therein, was appointed and qualified as executrix, and took possession of the estate, and proceeded to settle it, and, in the course of such proceeding, sold certain of the real property, as such executrix, there was nothing in such conduct indicating an election on her part to take under the will.—*IN RE PROCTOR'S ESTATE*, Iowa, 72 N. W. Rep. 618.

121. **WILLS — Equitable Conversion.**—Where a will contemplates, as to legacies therein named, that it should be executed in personalty exclusively, the doctrine of equitable conversion applies to so much of the real estate as is necessary to be sold to meet such legacies, and the court will deal with such realty as though it were personalty.—*MCUGH V. MCDOOLE*, Wis., 72 N. W. Rep. 631.

122. **WILLS — Incapacity.**—A testator will be deemed to have had capacity to make a will if he comprehended his property, the natural objects of his bounty, the character of the business in which he was engaged, and the disposition he resolved to make of his property, when he gave instructions for the will, and when he executed it, though there were periods before and after the making of the will when he was so mentally unsound as to be incapable of making a will.—*CLAFFEY V. LEDWITH*, N. J., 38 Atl. Rep. 483.

123. **WILLS—Life Estate.**—A testator devised his estate to his widow during her life, and, on her death, to his lawful heirs, share and share alike. His widow enjoyed the property during her life, and on her death her administrator took possession, among other assets, of 26 shares of the stock of an insurance company, which stood in the name of the testator. The administrator sold these shares, and received the money, and one of the heirs filed a bill to compel a delivery of the assets: Held, that a judgment validating the sale was not warranted where the insurance company and vendees of the stock were not parties.—*QUICKSALL V. CHEW*, N. J., 38 Atl. Rep. 442.

124. **WILLS — Testamentary Powers.**—One to whom her husband devised a life estate in lands, coupled with the power of disposition of the fee, sufficiently indicates her intention to execute the power by will reciting that she makes it "in pursuance of, and to more fully carry out the provisions of, the last will of my husband," in which she makes only money bequests, with a residuary devise, though therein she speaks of the estate and property as "my estate" and "my property," there being no other provision in her husband's will to which her reference can apply.—*BULLERDICK V. WRIGHT*, Ind., 47 N. E. Rep. 931.

125. **WITNESS — Transaction with Deceased Person.**—Under Code Proc. § 1646, providing that, in an action where the adverse party sues or defends as deriving title from a deceased person, a party in interest shall not be admitted to testify in his own behalf as to any transaction had by him with such deceased person, a surviving husband suing to establish a resulting trust in lands standing in his wife's name, and claimed as community property by a daughter of the wife, is not a competent witness in his own behalf as to transactions with the deceased wife tending to establish the trust.—*SPENCER V. TERREL*, Wash., 50 Pac. Rep. 468.